



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



**HARVARD LAW SCHOOL
LIBRARY**

91

35

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF ERRORS AND APPEALS
FOR THE
STATE OF MISSISSIPPI.
W. C. SMEDES AND J. P. MARSHALL,
OF VERMONT,
REPORTERS TO THE STATE.

VOLUME VII.

CONTAINING CASES FOR NOVEMBER AND JANUARY TERMS, 1846.

BOSTON:
CHARLES C. LITTLE AND JAMES BROWN.
1847.

Entered according to Act of Congress in the year 1847,
By W. C. SMEDES and T. A. MARSHALL,
In the Clerk's Office of the District Court of the District of Massachusetts.

BOSTON :
PRINTED BY FREEMAN AND BOLLES,
DEVONSHIRE STREET.

JUDGES
OF THE
HIGH COURT OF ERRORS AND APPEALS,
DURING THE TIME OF THESE REPORTS.

HON. WILLIAM L. SHARKEY, CHIEF JUSTICE.
HON. ALEXANDER M. CLAYTON, } JUSTICES.
HON. J. S. B. THACHER, }

JOHN D. FREEMAN, Esq., ATTORNEY-GENERAL.
GEN. JOHN M. DUFFIELD, CLERK.

TABLE

OF THE CASES REPORTED.

PAGE.		PAGE.
592	Agricultural Bank v. Commercial Bank of Manchester,	592
663	American Colonization Society v. Wade,	443
630	Anderson, Delafield v.	437
586	Anderson v. Miller,	356
192	Andrews v. Planters Bank,	791
302	Atkinson v. Fortinberry,	197
467	Anketell v. Torrey,	185
49	Barrow v. Wade,	280
214	Beard, Johnston v.	64
101	Bennett, Prewitt v.	630
32	Benoit v. Brill,	479
185	Benton v. Crowder,	319
724	Benton and Manchester Railroad Co., Robson v.	475
316	Bernard, Caillaret v.	244
319	Bernard, Doe ex dem. Caillaret, v.	9
77	Berry v. Bland,	15
77	Bland, Berry v.	333
715	Bohr v. Steamboat Baton Rouge,	206
397	Bondurant, Harper v.	68
32	Brill, Benoit v.	308
513	Brooks v. Whitson,	375
125	Brown, Coffman v.	280
9	Bullard v. Dorsey,	544
316	Caillaret v. Bernard,	507
107	Campbell, Sandford v.	651
428	Carradine v. Collins,	85
798	Carroll v. Renich,	235
99	Carson v. Flowers,	404
532	Chambliss, Hunt v.	313
791	Chilton v. Cox,	99
488	Claiborne, Williams v.	302
125	Coffman v. Brown,	64
437	Cohea v. Commissioners Sinking Fund,	249
429	Collins, Carradine v.	235
	Commercial Bank of Manchester, Agricultural Bank v.	
	Commercial Bank of Columbus v. Thompson,	
	Commissioners Sinking Fund, Cohea v.	
	Conley, Pearl v.	
	Cox, Chilton v.	
	Creighton, Greene v.	
	Crowder, Benton v.	
	Dahlgren v. Duncan,	
	Davis v. Foy,	
	Delafield v. Anderson,	
	Dillingham v. Jenkins,	
	Doe ex dem. Caillaret v. Bernard,	
	Dominges v. State,	
	Donnell, Heaverin v.	
	Dorsey, Bullard v.	
	Dorsey, Money v.	
	Dowell, James v.	
	Dowell v. Sanders,	
	Doyle, Frost v.	
	Duckworth v. Millsaps,	
	Dulaney v. Starke,	
	Duncan, Dahlgren v.	
	Edwards v. Roberts,	
	Elder, Smith v.	
	Ellis v. Ward,	
	Enos v. Smith,	
	Falconer v. Frazier,	
	Fatheree, Lang v.	
	Fisher, Gasquet v.	
	Flowers, Carson v.	
	Fortinberry, Atkinson v.	
	Foy, Davis v.	
	Francher, Hairston v.	
	Frazier, Falconer v.	

	PAGE.		PAGE.
Freeland, Scott v.	409	Minis, Hutchinson v.	388
Frost v. Doyle,	68	Mims, Ross v.	121
Gaines v. Smiley,	53	Mississippi Union Bank, Hey-	
Garvin v. Lowry,	24	fron v.	434
Gary, Wadlington v.	522	Monet, Graves v.	45
Gasquet v. Fisher,	313	Money v. Dorsey,	15
Gilbert, Walker v.	456	Montgomery v. McGimpsey	557
Graves v. Monet,	45	Moreland, Pearson v.	609
Green v. Creighton,	197	Mosby, Peques v.	340
Hairston v. Francher,	249	Mount v. State,	277
Hallock, Lauderdale v.	622	Murdoch v. Hughes,	219
Harmon v. James,	111	Newell, Wellons v.	399
Harper v. Bondurant,	397	Northern Bank of Mississippi,	
Heaverin v. Donnell,	244	Williams v.	28
Hester v. Hooker,	768	Parkinson v. Waldron,	189
Heyfron v. Mississippi Union		Payne v. Stone,	367
Bank,	434	Pearl v. Conley,	356
Hit-tuk-ho-mi v. Watts,	363	Pearson v. Moreland,	609
Hooker, Hester v.	768	Peques v. Mosby,	340
Hooker, Lee v.	601	Percy, Vick v.	256
Hughes, Murdoch v.	219	Planters Bank, Andrews v.	192
Hunt v. Chambliss,	532	Planters Bank v. Johnson,	449
Hutchinson v. Minis,	388	Planters Bank v. State,	163
James v. Dowell,	333	Poindexter v. LaRoche,	699
James, Harmon v.	111	Prewitt v. Bennett,	101
Jenkins, Dillingham v.	479	Raymond Railroad Co., Stew-	
Jenkins v. Whitehead,	577	art v.	568
Johnson, Planters Bank v.	449	Regan v. Stone,	104
Johnston v. Beard,	214	Renich, Carroll v.	798
Johnston v. State,	58	Reynolds, Sessions v.	130
Keirn, McAfee v.	780	Rhodes, McCoy v.	296
Knight v. Yarborough,	179	Roberts, Edwards v.	544
Lane, Truly v.	325	Robinson v. White,	39
Lang v. Fatheree,	404	Robson v. Benton and Manchester	
LaRoche, Poindexter v.	699	Railroad and Banking Co.,	724
Lauderdale v. Hallock,	622	Ross v. Mims,	121
Lee v. Hooker,	601	Ross v. Wilson,	753
Leggett v. Simmons,	348	Sanders, Dowell v.	206
Livingston, McNutt v.	641	Sandford v. Campbell,	107
Lowry, Garvin v.	24	Scott v. Freeland,	409
McAfee v. Keirn,	780	Scott v. Searles,	498
McCaughan, Weems v.	422	Searles, Scott v.	498
McCoy v. Rhodes,	296	Sessions v. Reynolds,	130
McGimpsey, Montgomery v.	557	Simmons, Leggett v.	348
McNutt v. Livingston,	641	Smiley, Gaines v.	53
Miller, Anderson v.	586	Smith v. Elder,	507
Miller, Wooten v.	380	Smith, Enos v.	85
Millsaps, Duckworth v.	308	Starke, Dulaney v.	375
		State, Dominges v.	475
		State, Johnston v.	85

TABLE OF CASES REPORTED.

ix

	PAGE.		PAGE.
State, Mount v.	277	Wadlington v. Gary,	522
State, Planters Bank v.	163	Waldron, Parkinson v.	189
Steamboat Baton Rouge, Bohr v.	715	Walker v. Gilbert,	456
Stewart v. Raymond Railroad		Ward, Ellis v.	651
Co.	568	Watts, Hit-tuk-ho-mi v.	363
Stone, Payne v.	367	Weems v. McCaughan,	422
Stone, Regan v.	104	Wellons v. Newell,	399
		White, Robinson v.	39
Thompson, Commercial Bank of		Whitehead, Jenkins v.	577
Columbus v.	443	Whitney v. Whitney,	770
Thompson v. Williams,	270	Whitson, Brooks v.	513
Tift v. Virden,	91	Williams v. Claiborne,	488
Torrey, Anketell v.	467	Williams, Thompson v.	270
Truly v. Lane,	325	Williams v. Northern Bank of	
		Mississippi,	28
Vick v. Percy,	256	Wilson, Ross v.	753
Virden, Tift v.	91	Wooten v. Miller,	380
Wade, Barrow v.	49	Yarborough, Knight v.	179
Wade v. American Colonization			
Society,	663		

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ERRORS AND APPEALS

FOR THE

STATE OF MISSISSIPPI.

JANUARY TERM, 1846.

JOSEPH BULLARD et al vs. WASHINGTON DORSEY.

Where a rule for security for costs has been allowed in the court below, and the record does not show that any motion to dismiss was made below for want of security, or that the security required by the rule was not given, and the cause progressed to judgment after the rule was taken; *held*, that this court would not disturb the judgment.

There is no such plea given by our law as set-off, and a demurrer to such a plea is therefore properly sustained.

A set-off must be mutual, that is, between the same parties, or, as expressed in our statute, the parties must "be dealing together;" otherwise it cannot be allowed; where, therefore, D. sued B. & M. on a note payable to E. or bearer; and the defendants proposed to prove that E. transferred the note to W., and while W. was bearer of it, he was indebted to M. in a larger amount by note, and had promised that M. should be allowed to credit the note sued on, on the note held by M.; *held*, that the evidence was inadmissible; the individual debt of W. to M. could not be set off against the joint debt of B. & M.

10 HIGH COURT OF ERRORS AND APPEALS.

Bullard et al v. Dorsey.

CLAYTON, J. dissenting, and holding that under our statute, making all joint liabilities, whether of partners or others, joint and several, it was a proper subject of set-off.

Where a plaintiff sues upon a joint note, the defendants cannot set off a debt due by the plaintiff to one of the defendants in his own right. CLAYTON, J. dissenting.

In error from the Hinds circuit court; Hon. John H. Rollins, judge.

Washington Dorsey sued Joseph Bullard and Philip Myers in an action of assumpsit on a note in these words :

"\$476. On or before the first day of January, A. D. 1840, I promise to pay David Ellison or bearer, four hundred and seventy-six dollars, for value received. August 13, 1838.

JOSEPH BULLARD.

PHILIP MYERS."

The defendants plead, 1. non assumpsit; 2. a special plea of set-off; that Ellison indorsed and delivered the note sued on to Kinchin Wilkinson, who, being the holder and bearer, was indebted to the defendant, Myers, by note of a larger amount, and previous to the commencement of the suit, agreed to set off the note sued on, on the note held by Myers; 3. a plea of payment, with notice of set-off of the debt due by Wilkinson to Myers.

The suit was instituted on the 19th of May, 1842. The record recites, that "at the December term, 1842, on the fourth day of the term, it being the 22d day of December, 1842, upon motion and affidavit filed, ordered that plaintiff in this case give security for costs within sixty days, or this cause will be dismissed." No other entry appears of record touching this motion for security for costs.

At the June term, 1843, the plaintiff demurred to the defendants' second plea, and the demurrer was sustained. At the March special term, 1844, a jury was empanelled, and the cause submitted to them, and on the trial the defendants offered as a set-off the note of Kinchin Wilkinson to Myers for six hundred dollars, and in support of the off-set proposed to prove

that the note sued on never was indorsed by the payee to the plaintiff, but indorsed by him in blank and delivered to Wilkinson, the maker of the note offered as a set-off, and that Wilkinson had transferred it to the plaintiff, who had filled up the indorsement as a special one to himself; that while the note sued on was in Wilkinson's possession, Myers was the holder of his note for the six hundred dollars; of which fact Wilkinson had notice; and that it had been understood and agreed between Wilkinson and Myers, that the one note should be a set-off against the other; but Wilkinson, in violation of his agreement, assigned the note of the defendants to the plaintiff; that, by an arrangement between Myers and Bullard, the burthen of paying and discharging the note sued on had been devolved on Myers, and for that end he had reserved the note of Wilkinson. The court below refused permission to introduce the testimony, and rejected the set-off. The defendants filed a bill of exceptions thereto, and have brought the case to this court.

J. N. Mitchell, for plaintiff in error, contended,

1. That the rule for security for costs was in itself a *dismissal* of the case, if the rule was not complied with; and that it required no further action of the court.

2. That the plea of set-off, though perhaps not technically drawn, was a good plea. 2 Bay's Rep. 351; 2 Yerg. 111; 1 Bay, 437; H. & H. 373.

3. That the court erred in not permitting the set-off under the plea of payment and the proof offered. 1 Bay, 437; 2 Yerg. 111.

Amos R. Johnston, on the same side.

1. The record shows a rule for security for costs; and does not show a compliance therewith; the presumption is, the rule was not complied with, and therefore the cause was out of court. How. & Hutch. 585, 586.

2. The second plea was a good plea, and a bar to the action. How. & Hutch. 373, 374.

12 HIGH COURT OF ERRORS AND APPEALS.

Bullard et al. v. Dorsey.

3. The evidence should have been admitted under the plea of payment. Dorsey took the note subject to the disabilities placed upon it by the arrangement between Wilkinson and Myers.

Shelton, for defendant in error.

1. The position with reference to the motion for security for costs is not tenable, because, 1. the bond given for costs on compliance with the rule is no part of the record. 2. The rule was never made absolute. *Mississippi & Alabama Railroad Company v. Ballard*, MS. 3. The defendants, by going to trial without objection, waived the right to dismiss, if it existed. *Ibid.*; and 3 S. & M. 38.

2. The plea of set-off is bad in this state. 4 How. R. 142; 2 S. & M. 597; 1 Blackf. R. 188; *Ibid.* 367.

3. The evidence offered in behalf of the plea of set-off was inadmissible. 1. A separate debt cannot be set off against a joint. 11 Verm. 204; 8 Watts, 262; *Ibid.* 406; 18 Pick. 403; 5 Blackf. 37; *Ibid.* 146; *Ibid.* 306; *Ibid.* 585; 2 Leigh's R. 493. 2. A set-off of a demand on an indorsee is not allowed against a subsequent indorsee. H. & H. 615; 2 John. R. 150-155; H. & H. 373, §12; 3 Verm. R. 540. 3. This was not set off against the payee. 4 S. & M. 87; 3 Verm. 540; Harrison R. 222; Baily on Bills, 3, n.; Archbold's N. P. 97, 98, 100, 101, 131, 132; 10 Barn. & Cress. 558, (21 Eng. Com. Law Rep.); 9 Adol. & Ellis, 275, (36 Eng. Com. Law); 10 Mees. & Wels. 696; 6 Cow. 693; 3 Wend. 13; 5 Wend. 342.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

Dorsey brought this suit in the circuit court on a promissory note made by the plaintiffs in error, payable to one Ellison or bearer, and recovered judgment, which the plaintiffs now seek to reverse.

The first ground relied on for a reversal, is that the court erred in refusing to dismiss the cause for want of security for costs. If this were even good cause for reversing the judgment, there is a very conclusive answer to it in the present instance,

which is, that for anything that appears on the record, the security may have been given. It does not appear that any motion was made to dismiss for want of security for costs, or that such security was not given as required by the rule.

The second ground is that the court erred in sustaining a demurrer to defendants' second plea. It is a plea of set-off, in which it is averred that Ellison, the payee, indorsed the note in blank to one Wilkinson, who thereby became the owner, and that Wilkinson was at the time indebted to Myers, one of the defendants in the court below, on a promissory note for a larger amount than the note sued on, and had agreed with and promised Myers that the amount of the debts should be set off. There is no such plea given by our law as set-off, and the demurrer was therefore properly sustained.

But the defendants had also filed the plea of payment, and offered to prove under it that Ellison had indorsed the note to Wilkinson, who transferred it to Dorsey without indorsement; that at the time Wilkinson was holder of the note sued on he was indebted to Myers by note for a larger amount, and that he had promised that Myers should be allowed to credit the amount of the note sued on, upon the note of Wilkinson, held by Myers. The note of Wilkinson was also offered in evidence, but the defendants were not permitted to make this proof. If the note of Wilkinson to Myers alone was a good set-off against the note of Bullard & Myers, the testimony should have been admitted.

By the settled construction of the acts of 2 Geo. II. and 8 Geo. II., the debts must be between the same parties to constitute a good set-off; they must be in the same right, although they need not be of the same dignity. In an action by two persons, the defendant cannot set-off a debt due him by one of them. Chitty on Contracts, 328. The American decisions under the several statutes of set-off, are generally in accordance with the English decisions. *Walker v. Lughton & James*, 11 Mass. Rep. 140; *Ritchie & Wales v. Moore*, 5 Munford, 388; *Wheeler v. Raymond*, 5 Cowen, 231; *Wolf v. Washburn*, 6 Cowen, 261; 5 Cranch, 34; 4 Randolph, 359.

The language of the act of Geo. II. is that *mutual debts* may

be set off, and if the debt is not between the same parties, it is said to lack mutuality. Our statute is that "If two or more dealing together, be indebted to each other upon bonds, bills, &c." the debts may be set off. This language would seem to require the same mutuality of indebtedness that the English statute does. The parties must be dealing together, that is, there must be mutual dealings. The dealings are not mutual unless they are between the same parties, and if not, there is no dealing between them. A note or debt due from A to B, does not constitute a dealing between A and C. Under a different interpretation our statute would seem to lead to difficulties. If the set-off be greater than the plaintiff's demand, he is entitled to a certificate and judgment in his favor. If there be two defendants and the set-off is due to one of them only, does he obtain the judgment, or must it be rendered in his favor jointly with his co-defendant? The court could not, I apprehend, sever them, and thus the plaintiff in the action would become judgment-debtor to a man with whom he had never contracted. On our construction of the statute the note due to Myers alone was not a good set-off against the joint note of Bullard & Myers, and the court correctly ruled out the evidence.

Judgment affirmed.

Mr. Justice CLAYTON delivered the following dissenting opinion :

The effect of our several statutory provisions, is to make all *joint* liabilities, as well of partners as of others, *joint and several*. This makes a change in the law of set-off, so far as to make all such the subject of set-off. See Babington on Set-off, 17; *Fletcher v. Dyke*, 2 T. R. 32. In this case Ashhurst, J. said, "A joint and several bond is the separate debt of all the obligors, and therefore may be set off against either." A set-off is but a cross action. If therefore either of the parties might be sued separately, I do not see why the claim might not be made the subject of set-off against either.

But as the majority of the court have come to a different conclusion, upon full examination, it only remained for me to put down the reasons of my dissent.

JAMES MONEY vs. WASHINGTON DORSEY et al.

The interest of the vendor in land who has given a bond for title, on payment of the purchase-money, and who has received a portion of the purchase-money from the vendee, is not subject to seizure and sale under execution at law, at the suit of a judgment-creditor, who has obtained his judgment since the date of the title bond and the payment of such portion of the purchase-money.

Where a bond to make title on payment of the purchase-money is given, the vendor has a lien on the land for the payment thereof; and when the vendee has paid the whole, or any part thereof, he has a lien on the land for the title, which will prevail against the lien of a judgment-creditor of the vendor, whose judgment is subsequent to the agreement to convey and the receipt of the consideration-money; it seems, however, that the lien of such vendee will not prevail against a *bona fide* purchaser from the vendor subsequent to the date of the title bond and payment of portion of the purchase-money, for a valuable consideration and without notice.

The extent of the right of a judgment-creditor of the vendor of real estate, who has given a bond for title on payment of the purchase-money, and received a portion thereof, is to subject the unpaid purchase-money in the hands of the vendee to the satisfaction of his judgment.

The lien of a judgment operates only on the interest of the judgment-debtor at the date of its rendition; and cannot, therefore, prevail against the prior equitable lien of a vendee from such judgment-debtor who has received from his vendor a bond for title, and paid part of the purchase-money; though his bond for title has never been recorded.

M. bought a piece of land from P. and paid part of the price in cash, and received a bond for title on payment of the residue; P. afterwards sold the same land to C., who resold it to M.; subsequent to the sale by P. to M., but before the sale by P. to C., a judgment was recovered by D. against P., and levied on the same land; *held*, that M. was entitled to an injunction against the sale; that P. had not an interest capable of sale under execution; and was a mere trustee of the title for M., whose interest was not affected by the sale to C.; though it might have been otherwise if C. had set up that he was a *bona fide* purchaser, for a valuable consideration, without notice of the previous sale to M.

If the answer of a defendant to a bill in chancery be made a cross-bill, the answers of the complainant to the interrogatories propounded on the cross-bill are good evidence in favor of the complainant.

APPEAL from the vice-chancery court at Carrollton, Hon. Henry Dickinson, vice-chancellor.

James Money filed his bill in the vice-chancery court at Carrollton, charging that, in December, 1837, he purchased of Marcus Pierce the east half of the north-west quarter of Section No. 18, Township No. 19, of Range 4, east, except about four acres, which had been previously sold off of the south-east and south-west corners thereof, lying and being in the county of Carroll; for which he agreed to pay the sum of three thousand dollars; that he took from Pierce a bond for title when the purchase-money should be paid. Early in the spring of the year 1838, complainant took possession of the land and resided on it for several years. The bill states that the title-bond was not recorded, though the purchase of complainant was a matter of general public notoriety, known not only to the citizens of the neighborhood, but also to the person seeking to subject the land to the payment of an execution then in the hands of the sheriff, which was issued on a judgment obtained against Pierce in Carroll county, long after the date of complainant's purchase. The bill further states, that complainant paid to Pierce the whole of the purchase-money, agreeably to his contract; and the complainant was requested by said Pierce, for some reason unknown to him, to accept a deed to the land through William C. Clark, which he, in good faith, agreed to; consequently Pierce did, on the 4th day of May, 1839, convey the same to Clark, and Clark, on the 14th day of November, 1839, conveyed it to complainant. Both deeds are made exhibits to the bill. The bill further charges that, in October, 1838, long after complainant was in possession of said land, Washington Dorsey obtained a judgment in the circuit court of Carroll county against said Pierce, and one C. P. Newell. Upon which an execution was issued and levied on said land, and the same would be sold unless the sale should be enjoined. Pierce and Clark are both charged to be insolvent. Marcus Pierce and

Washington Dorsey are made defendants. Prayer for an injunction, &c. The answer of Pierce admits all the material allegations of the bill. Dorsey answers, and admits that he obtained judgment in the circuit court of Carroll county, in 1838, against Pierce and Newell, for five thousand dollars, and that an execution had been issued thereon, and levied on said land, as charged in the bill. Respondent denies, however, that he had notice of complainant's purchase before the recovery of said judgment; and avers his belief that the purchase was not in fact made until long after the rendition of the judgment. He avers that the judgment was a lien upon the land at the time complainant purchased, of which complainant had at least constructive notice; and the actings and doings of the complainant are therefore calculated to deprive and defraud respondent of his just rights. By leave of the court, Dorsey afterwards filed an amended and supplemental answer, which is also made a cross-bill, charging that the said deed, executed by Marcus Pierce to William C. Clark, on the 5th day of May, 1839, was made by Pierce for the purpose of hindering and delaying his creditors, and to anticipate a sale under execution upon cases then pending against him; that Clark paid no consideration whatever for the land, and received none from the complainant; and the whole transaction was therefore fraudulent and void; and if not done at the instance of complainant, he possessed full knowledge of the intention and design of it. The cross-bill further charges, that at the time the judgment in favor of Dorsey was rendered, Money had paid, if any, a very inconsiderable portion of the purchase-money he had contracted to pay Pierce; and that most, or all of the money he has paid, has been paid with a full knowledge of the legal and equitable rights of Dorsey. The complainant is called on to answer the several allegations of the cross-bill, and especially to state whether he did not know, or believe, from circumstances within his knowledge, that the conveyance from Pierce to Clark was made to hinder, delay, and defraud creditors, and whether he did not learn from Pierce or Clark that such was the intention; and to state what portion of the purchase-money he paid

18 HIGH COURT OF ERRORS AND APPEALS.

Money v. Dorsey et al.

Pierce was paid before the 3d day of October, 1838, what subsequently, and at what times the payments were made. The complainant answered the cross-bill, denying that he had any knowledge of the intention or design which Pierce and Clark, or either of them, entertained, when Pierce executed said deed to Clark, or that he ever heard them, or either of them, say, or that he believed from circumstances within his knowledge, that said deed was designed to hinder, delay and defraud creditors, or that it was without consideration. It is true Pierce inquired of him whether, as he had not had the title-bond recorded, it would not be best, to save him trouble, to have the conveyance made through Clark. And he replied to Pierce, that inasmuch as he had bought the property, paid a high price for it, and was in possession, he had no fears on the subject, and cared nothing about the manner in which the conveyance should be made to him. He denies that he was in any way privy to the intentions of either Pierce or Clark in the transaction, further than Pierce's declaration, that it would save him trouble. He denies that he knew, or believed, when he made said purchase, that said Dorsey had any legal or equitable right to said land, or any lien upon it, either by judgment or otherwise. In answer to the special interrogatories contained in the cross-bill he says, that before the 3d day of October, 1838, he had paid Pierce upwards of two thousand dollars; one thousand of which was paid when he made the purchase and took possession of the land. The precise amount paid prior to the 3d day of October, 1838, he could not state. The balance of the purchase-money was paid in small amounts, in money and property; but he could not give the dates and amounts of the several payments, in consequence of his books having been destroyed by fire at the time his house was burnt, in the summer of 1843. He denies all fraud or combination in the premises. No depositions were taken, or other evidence offered on either side than such as was contained in the pleadings and exhibits. The court dissolved the injunction, dismissed the bill, and ordered the complainant to pay the costs; whereupon the complainant prayed an appeal to this court.

William R. Saunders, for complainant.

The first question to be determined is, whether a purchase was made and possession taken of the land in controversy, by complainant, Money, before the rendition of the judgment, or before levy made and sale advertised. For if a purchase was made, and possession taken under the purchase, prior to the rendition of the judgment, the possession is notice to all creditors and subsequent purchasers, and is equivalent to recording the title-papers to the land. *Dixon & Starkey v. Lacoste*, 1 S. & M. 70. Complainant Money, in his bill, which is sworn to and made proof in the cause, alleges the fact that he did purchase said tract of land, and took possession, in January, 1838, some ten months prior to the rendition of Dorsey's judgment, it being in October of that year, which is confirmed by the answer of Pierce, and also by the answer of Money to the cross-bill of defendant, Dorsey, as set forth in Dorsey's answer, by way of cross-bill. When a complainant is required to answer matter set up in respondent's answer, in shape of a cross-bill, it will have the same effect, in this state, as an answer to an original bill. How. & Hutch. Dig. 525, sect. 37; *Oakey v. Robb's Executors*, 1 Freem. Ch. R. 546. The answer to allegations in complainant's bill, when required to be answered, will always stand as evidence in the cause. 1 Freem. Ch. R. 547, above cited; *Rose v. Mynett*, 7 Yerg. Ten. R. 30. The general rule in chancery is, that an answer, responsive to the allegations and charges made in bill, and containing clear and positive denials thereof must prevail, unless disproved by two witnesses, or a witness and attendant circumstances. *Daniell v. Mitchell*, 1 Story's R. 172; 4 Equity Digest, 417; *Manchester v. Day*, 6 Paige's Ch. R. 295; *Smith v. Brush et al.* 1 John. Ch. R. 457; 2 Maddock's Chancery, 442, and the authorities there cited. If any other rule were to prevail it would be productive of the greatest injustice to the respondent.

The respondent, Dorsey, calling upon the complainant, Money, to answer specially, in the shape of cross-bill, makes him his witness; and it would be a hard rule, that the statements of a witness should be evidence for one party, and not for the other.

Such a rule would be fraught with the most glaring injustice to the litigants. The purchase and possession of Money, being anterior to the judgment, must therefore prevail. Again, if the above position be not correct, this view of the case is submitted to the consideration of the court: That, as respondent, Dorsey, charges that no sale was made, or money paid, and calls specially upon Money to state the facts, he thereby makes Money's answer evidence, by the rules of pleadings as above laid down. Money, in his answer, states that he purchased in good faith; that he paid two thousand dollars before the rendition of the judgment, and, on account of his papers being burnt by accident, with his buildings, he cannot state the exact dates of the other payments; but, that he paid the balance of one thousand dollars in a short time after the rendition of the same. Such a statement of facts gives him unquestionable title to the land; and at all events is a lien upon the same for two thousand dollars, the amount proven to be paid at the rendition of the judgment; as there is no proof showing his knowledge of the debt from Pierce to Dorsey, or outstanding title creating a lien on said land. *Moss v. Davidson*, 1 S. & M. 112.

William and W. G. Thompson, on the same side.

Q. D. Gibbs, for appellant.

Complainant charges, he was in possession of the land at the time of the rendition of the judgment, under a memorandum of purchase from the judgment-debtor, Pierce.

These charges are denied by the answer, and there is no proof whatever sustaining them. In complainant's answer to amend anew, and cross-bill of Dorsey, there is an equivocal statement to that effect, but it is in no way responsive to the cross-bill, and is no evidence in this cause. The principles settled in the case of *Dixon & Starkey v. Lacoste*, cannot so much as apply to the case at bar; there is no analogy between them. No memorandum in writing is shown to have existed at the rendition of the judgments; no contract of purchase, in fact, which could, under the statute of frauds, be enforced. And even if

such did exist, by the case disclosed by complainant himself, it was abandoned, and a new contract of title made and executed by Clark to Pierce, after the judgment was rendered. By accepting that deed, in lieu of the contract of sale, which he says was previously made, he is estopped from setting up the conveyance from Pierce to him, or the agreement to convey. Comyns's Dig. Estoppel R. 1, 2, sec. 156; 12 Johns. R. 357; 1 Nott & McCord, 373.

Mr. Justice CLAYTON delivered the opinion of the court.

This is an appeal from the vice-chancery court at Carrollton. The bill states that complainant, the now appellant, purchased of one Marcus Pierce a lot of ground for three thousand dollars, in December, 1837, and took his bond for title when the purchase-money should be paid; that he took possession of the premises at the time, and paid a considerable portion of the purchase-money. That in October, 1838, the defendant Dorsey obtained a judgment against Pierce; that in May, 1839, Pierce, who is likewise made a party, conveyed the premises, with other land, to one Clark, who, in November, 1839, conveyed to the complainant. That the title-bond was never recorded, and that the defendant Dorsey, had his execution, under his judgment, levied upon the lot, to enjoin the sale of which is the object of the bill. Other extraneous matters are introduced, which can have no influence upon the decision.

The answer of Pierce admits all the charges of the bill. The first answer of Dorsey denies that complainant purchased before his judgment was rendered; or, if he did, insists that the failure to record the title-bond let in his judgment. He afterwards filed another answer, which is made to operate as a cross-bill. He then states that he believes that, at the time of the judgment, the complainant had paid, if any, a very inconsiderable portion of the purchase-money, which he had agreed to pay Pierce, and asks him to state, in answer to the cross-bill, "what portion of the purchase-money he had paid Pierce before the 3d of October, 1838, what subsequently, and at what times." The answer to this interrogatory states that he paid, in cash,

one thousand dollars at the time he made the purchase, at which time, also, he took possession; and more than another thousand, prior to the 3d of October, 1838.

The answer of Dorsey insists that the conveyance from Pierce to Clark was fraudulent and void. The title-bond is not filed as an exhibit, nor was any deposition taken in the case.

The doctrine is well established that, from the time of a sale of land, the vendor becomes a trustee of the title for the vendee, as the latter is a trustee of the purchase-money for the former. In each instance a lien is created upon the estate for the money. This lien will prevail against a judgment-creditor of the vendor, intervening between the time of the agreement to convey and receipt of the consideration-money, and the actual conveyance. *Finch v. Earl of Winchelsea*, 1 P. Wms. 177; 4 Kent, 153; 2 Story's Eq. 481. The lien of the judgment could only operate upon the interest which Pierce had at the time of its rendition. The judgment-creditor takes the place of the judgment-debtor. He can occupy no higher ground, unless in cases of fraud. 2 Johns. Ch. 50; *Coutts v. Walker*, 2 Leigh; 8 Ohio, 22; 2 Ire. Eq. 121, 509; 3 Paige, 123; 4 Ibid. 9.

If any portion of the purchase-money be paid before the judgment, the land can no longer be the subject of execution-sale, as the property of the vendor, whatever might be the rule, upon a naked contract of sale, without any payment.

These principles being ascertained, the only difficulty is in determining the true state of facts. It would seem probable that they might have been placed in a much clearer point of view, but we can only look at them as presented in the record.

If Dorsey had filed no cross-bill, there would have been no proof in support of the original bill, and it must have been dismissed. But the answer to the cross-bill is in direct response to its interrogatories, and must be regarded as evidence.

That proves the purchase and the payment of a large part of the purchase-money, before the judgment; the vendor then had no interest upon which the judgment lien could attach.

The vendee has a lien upon the estate purchased for the money he has paid; the judgment-creditor has but a lien, subsequent in point of time, and inferior in point of equity. 2 Story's Eq. 481. It might be different in regard to an intervening mortgagee, or purchaser for valuable consideration, and without notice. 4 Kent, 154.

In this state of case Pierce was a mere trustee of the legal title for another, without any beneficial interest which could be sold under execution at law. The creditor, by proper proceedings, might have reached the unpaid purchase-money in the hands of the complainant, but that was the extent of his right.

The conveyance to Clark does not benefit Dorsey, or affect the right of Money. No fraud is shown, nor the slightest suspicion of fraud, so far as the complainant is concerned. The deed operated a transmission of the legal title of Pierce to Clark, but that does not prejudice the right of Money. If, indeed, Clark had insisted that he was a purchaser for valuable consideration, without notice, and *bona fide*, then his title might have prevailed over the equity of the complainant. But he asserted no such right, and conveyed to the complainant; this had the same effect as if done by Pierce himself. His purchase had been made long before that of Clark, and if a fraud were intended by Pierce upon Dorsey, in the transaction with Clark, that would not vitiate a previous valid agreement with Money. There is no proof of fraud upon his part. If he had acquired his title through the fraud of Pierce and Clark, that title could not be permitted to stand in equity. *Huguenin v. Basley*, 14 Ves. 289. But the strength of his case is in the purchase and payment before the judgment, and he is entitled to relief independent of the deed of Clark, and without reference to it. His contest now is with Dorsey. Pierce does not deny his right, and Clark is not before the court. As against Dorsey, we think he has superior equity.

The decree must be reversed, and the injunction made perpetual.

WILLIAM GARVIN et al. vs. ROBERT LOWRY.

The authority of an attorney upon a general retainer, to collect money, extends no further than to receive the amount in legal currency; if he accept anything else, without special authority, the client may refuse to acknowledge it as a payment, and may, where the payment was on a judgment, re-issue the execution; where therefore an attorney at law received of his client's judgment debtor the notes of third persons, and receipted for them as cash to the debtor, the creditor, it was *held*, might still proceed with the execution against the debtor, unless the debtor could show that the attorney was authorized to make the arrangement; and the attorney's statements at the time that he was so authorized, will not be evidence of such authority; especially where the attorney, in his deposition, states that he has no recollection of having had a special authority.

Where the charge of the court is in accordance with the law, but the jury find contrary thereto and to the testimony; and the court below refuse to grant a new trial; this court will interpose and grant the new trial.

Before a client can be held, by acquiescence therein, to have ratified the act of his attorney, which was beyond the scope of his authority as such, it must be shown that the act was made known to him, and what course he adopted when informed of it.

In error from the Tishamingo circuit court; Hon. Stephen Adams, judge.

William Garvin and others, partners under the style of Garvin, Carson, & Co. sued Robert Lowry, in March, A. D. 1843, in an action of debt upon a judgment record from Tennessee. The defendant plead payment, and offered as evidence, in support of his plea to the jury, six receipts from Micajah Bullock, who was the attorney, who recovered the judgment in Tennessee. These receipts were for an amount sufficient to cover the judgment, and purport to be for money received from the defendant by Bullock. The plaintiff read Bullock's deposition, which proved, that although the receipts call for money, yet one was given for a fifty dollar bank note of Mississippi, at fifty per cent. discount, which proved to be entirely worthless, and was returned to the

defendant; and that the other receipts were given for promissory notes due to the defendant, which he was to collect and apply to satisfy the judgment; upon which notes some money had been collected, but that it was doubtful whether the remainder could be collected in a reasonable time, if at all. Bullock also states that he has no recollection that his clients, Garvin, Carson & Co. ever authorized him to receive anything but money in satisfaction of the debt. The defendant then introduced two witnesses, who proved that at the time of settlement, Bullock informed him, that he, Bullock, had full authority to settle the debt in any manner which he might think proper and right, that the claims recovered by Bullock for which the receipts were given, were taken as an unconditional payment. These receipts were given at various times in 1840, the last on the 24th October, of that year. On cross-interrogatory the defendant's witnesses stated that Bullock was an honorable man, and an excellent lawyer. This was all the proof. The court then, at the request of appellant's counsel, instructed the jury, 1st. That a receipt, purporting upon its face to have been given for money, may be explained by parol testimony. 2d. That a receipt made by the attorney of a party, for anything other than money, is not binding upon the principal without his authority to receive the thing for which the receipt was given. The jury found for defendant and the motion by plaintiffs for a new trial being overruled, they prosecuted this writ of error.

Wood and Walter, for plaintiffs in error.

The following principles of law are applicable to, and must decide this cause :

1. An attorney for the collection of a debt, has but a limited authority or agency. He cannot compromise the claim. 3 How. 314; 2 J. J. Marshall, 69, 70, 71.

2. Whenever the declarations or statements of an agent are beyond the scope of his agency or authority they do not bind his principal. 3 Phil. Ev. 185. And this though they should be contained in the agent's sworn bill in chancery. *Leeds v. Marine Insurance Co.* 2 Wheat. 380.

3. Neither the declarations of a man or his acts, can be given in evidence to prove his agency. 3 Phil. Ev. (Cow. & Hill's notes,) 189; *Plumsted's Lessee v. Rudebuck*, 1 Yates, 502.

W. and A. Yenger, for defendant in error.

The court certainly did not err in refusing a new trial. The jury were well warranted, from the proof, that Bullock was authorized to settle with defendant in the manner proved. Bullock did not state that he was not authorized, but merely that "*he did not recollect*" whether he was or not authorized to do so. Two of the witnesses of defendant prove, that when the settlement was made three years before, Bullock then said he was authorized so to settle, and the plaintiff himself proved Bullock to be a man of strict integrity, accurate business habits, &c.; all of which, coupled with the fact that plaintiff waited three years after the settlement before complaining of it, and that he has ratified Bullock's acts so far as to take the money, which was procured by means of that settlement,—all certainly forbid the jury to find any other verdict than they did. But even if it were doubtful which way the jury ought to have found, or if this court on the evidence would have found the verdict the other way, still this court will not reverse, it being a settled rule of law that a new trial will not be granted after the verdict of a jury, upon the ground that the verdict was against evidence, unless there was no evidence at all to justify the finding, or the preponderance against the verdict was very great. 3 How. 319; see *Bilbie v. Lumley*, 2 East; but particularly 12 Johns. R. 300.

Mr. Justice CLAYTON delivered the opinion of the court.

The principles which govern this case are very familiar, and have been frequently recognized by this court. The authority of an attorney upon a general retainer to collect money, extends no farther than to receive the amount in legal currency. If he accept anything else, without special authority, the client may refuse to acknowledge it as payment, and re-issue the execution.

In this case the attorney received the notes of third persons,

and gave a receipt for them as so much cash. These notes have not been paid to him. There is no proof that he had any special authority to receive these, or that the plaintiff recognized the payment.

The attorney, in his deposition, says, he does not recollect that he had any special authority for such purpose, but two other witnesses state that at the time of the transaction he represented that he had such authority. This contradictory testimony may detract from the credibility of the attorney, but cannot establish the fact that he had the necessary authority. Something more than his mere declaration is required. The character of the attorney for integrity and veracity is proven to be very good.

The charge given by the court was in accordance with the principles above stated, but the verdict is in opposition to the charge and to the testimony. The court overruled a motion for a new trial. There is nothing to sustain the finding, for even if the evidence of the attorney be rejected, still there is nothing to warrant the verdict. If he made a false representation of his authority, and thereby induced Lowry to make the settlement, he is liable to him for any loss sustained. But the plaintiffs are not bound by the act, according to the present state of the testimony. Something is said of the acquiescence of the plaintiffs in the act; it is not shown, when the transaction became known to them, or what course they adopted when informed of it. Knowledge or notice of a transaction is necessary to constitute a ratification by acquiescence.

On the whole, we think it more conducive to the ends of justice, that a new trial should be had, and the judgment will be reversed and new trial awarded.

BENJAMIN WILLIAMS et al. vs. THE NORTHERN BANK OF MISSISSIPPI.

The special plea of *retrasit* is a good plea under the practice of this state ; and it is therefore error to strike such a plea out and treat it as a nullity.

In error from the circuit court of Yalabusha county ; Hon. Benjamin F. Caruthers, judge.

The Northern Bank of Mississippi sued Benjamin Williams, Hugh Torrance, Sterling Harrison, Josiah Deloach, and Harvey H. Means, the former as drawer, and the latter as indorsers of a protested bill of exchange. Besides the plea of non assumpsit, the defendants, Williams, Torrance, and Harrison, interposed the following special plea :

“ And for a further plea in this behalf, the said defendants, Benjamin Williams, Hugh Torrance, and Sterling Harrison, by their attorneys, come and defend the wrong and injury, when, &c., and say *actio non*, because they say that heretofore, to wit, at the November term, 1842, of the court aforesaid, on the 17th day of said month, they the said defendants named in this plea, impleaded the said Josiah Deloach, who was then and there the holder of the said bill of exchange in the plaintiff's declaration mentioned, by virtue of the indorsement of the said plaintiff of the said bill to the said Josiah Deloach in the court aforesaid, for the non-performance of the same identical promises and undertakings in the said plaintiff's declaration mentioned, and such proceedings were thereupon had in the said court, that afterwards, to wit, in the said last mentioned term, the said Josiah Deloach, in his own proper person, came into the said court, and confessed that he would not further prosecute his said suit against the said defendants in this plea named, but from the same altogether withdrew himself ; therefore it was then and there considered by the court, that he the said Jo-

Williams et al. v. the Northern Bank of Mississippi.

siah Deloach should take nothing by the said bill, but that he and his pledges to prosecute should be in mercy, &c.; and that the said defendants should go thereof, without day, as by the record and proceeding thereof, all remaining in the court of the bench aforesaid, more fully and at large appear; which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void. And this the said defendants by the record and proceedings in the said court, are ready to verify. Wherefore, &c."

On motion of the plaintiff's attorney, this plea was stricken from the record, and the defendants excepted, and prosecute this writ of error.

Fisher, for plaintiff in error.

I show, that this plea has always been considered a good bar to a suit. The court is referred to 3 Chitty's Pleadings, 930, as to form. As to substance, see 3 Bl. Comm. 296; 1 Dunlap Pr. 494; 3 Salkeld, 245; Bing. on Judgments, 48; Lord Raymond's Reports, 598; Alabama Reports. The true question to be considered is, whether the plea was sufficient to require a demurrer to point out its defects. If so, the court below erred in striking it out; otherwise demurrers would no longer be tolerated in practice; a motion to strike out a bad plea would entirely usurp their office.

By the act of 1822, p. 589, sect. 1, H. & H. the defendant was permitted to file as many pleas as he might judge necessary to his defence. By the act of 1837, p. 596, sect. 35, this right, as to actions like the present, was restrained to the plea of non assumpsit. But by the act of 1838, p. 597, sect. 43, the act of 1837 is repealed. This is the language of the act of 1838: "It shall hereafter be lawful for the defendant or defendants in any suit, to plead as many pleas in bar of the action as he shall choose, although some of said pleas may be to the party, or to the character of the party suing."

Snider and Hutchins, for defendant in error.

1. Whether this decision be erroneous or not, depends upon the

question whether the matter pleaded was a simple discontinuance, (most commonly known in our practice and statutes by the name of "dismissal,") or an actual *retraxit*?

On looking into the *retraxit* plea of the plaintiffs in error, the court will discover that the bill of exchange, upon which the judgment now sought to be reversed was rendered, had previously been the basis of an action in the same court, in the name of one Josiah Deloach against the plaintiffs in error and others. It will also further appear, that this case no longer being in court, a new suit was commenced for the same cause of action, in the name of the defendant in error, against the plaintiffs in this court and others, together with Josiah Deloach, the plaintiff in the former action. Now the rule of law is clear, that when an action is misconceived, or in consequence of some defect in the pleadings, or other reason, it cannot be maintained, it may be discontinued, and a new one be instituted. 2 Archb. Prac. 233; *Knight's case*, 1 Salk. 329; 2 Stewart & Porter, 319. In this latter case the question of *retraxit* was distinctly before the court, and overruled.

2. Again; the court will observe, that as closely as the forms generally used approximate those of the books, the plea of the plaintiffs in error exhibits a discontinuance, with the exception of the allegation that the act was done in proper person. See Archbold's Forms, 129, 551. This solitary allegation, then, is the only one that particularly allies the plea to the ancient and altogether worn-out *retraxit* plea of the common law courts. But this feature fades into nothing and ceases to be distinctive, when it is recollected that no rule of law forbids a discontinuance in proper person. Taking then the plea as developing the nature of the act done in the former suit, and the circumstances under which it was done, the court, it is believed, can find no error that will justify a reversal of the judgment of the court below.

William G. Thompson, on same side, for defendant in error.

Retraxit is almost wholly unknown in modern practice. It will be found, on inspection of the early common law writers,

that the difference between a nonsuit and a retraxit, in the mode of proceeding, was this: Judgment of nonsuit, at a certain stage of the proceedings, was given against the plaintiff, only in his absence, or on his failure or neglect to prosecute; and judgment of retraxit was given only when the plaintiff came personally into court and withdrew his suit, stating that he desired no further to prosecute. The proceedings required to be pursued by the plaintiff, to take a judgment, in the early practice of the English courts, differs so much from what is now required in our practice, that the judgment of nonsuit in those courts in early times, is not fully analogous to the judgment of nonsuit with us in this country. By the practice with us, plaintiffs may voluntarily and personally take a nonsuit. By statutory provision in this state, the plaintiff may take a nonsuit, which will not be a bar to another action, by precisely such proceeding as by the early practice in England authorized a judgment by retraxit. How. & Hutch. 616, 623, 624. This works a virtual abolition of retraxit.

William Thompson on same side.

Mr. Justice THACHER delivered the opinion of the court.

The single question presented in this case is upon the legality of the judgment of the circuit court in directing a special plea of *retraxit* to be stricken out of the pleadings as a nullity.

The case of *Ralph Coffman v. Alfred S. Brown*, decided at this term of this court, recognizes this plea as appertaining to the practice of this state.

The court below therefore erred in its summary disposal of the plea of *retraxit* in this case, but should have required it to be disposed of or met by an issue according to its merits as a proper plea.

Judgment reversed, and the cause remanded for further proceedings.

Mr. Justice Clayton having been of counsel below, gave no opinion.

BERNARD BENOIT, JR. vs. JOHN BRILL.

Any one of several distributees of an estate may, at the expiration of the time restricted by the statute, apply by petition to the probate court for his distributive share without joining his co-distributees; and the probate court will compel the distribution on the petitioner's entering into the bond with the surety required.

Where a free man of color applied by petition in the probate court to have distribution of his father's estate; alleging in the petition that he was the natural son of his father, and that the legislature of the state, had granted him all the right, title and interest which it had by the law of escheat in his father's estate; and had by act confirmed his manumission; and the administrator answered, denying the freedom of the petitioner, asserting that he was the property of the estate, and that there were other persons claiming to be heirs of the deceased; but the administrator offered no proof of the slavery of the petitioner; *held*, that the petitioner made out a *prima facie* case of a right to distribution, and that the petition should be allowed by the probate court, unless the administrator should require an issue to the circuit court to ascertain the alleged freedom of the petitioner.

On appeal from the probate court of Harrison county; Hon. George Holly, judge.

Bernard Benoit, jr., averring himself to be a free man of color, filed his petition in the probate court of Harrison county, in July, 1844, setting forth that Bernard Benoit, sen., who was a free man of color, died intestate, in said county, sometime in December, 1841, and without legal heirs. That at his death he was possessed of a considerable estate, consisting of negroes and other personal property. That petitioner is the natural son of said decedent, and that in February, 1844, the legislature passed an act for his relief, by which the state relinquished to petitioner "all claim to said estate, by escheat;" and provided that "said estate should vest in petitioner in the same manner as though he had inherited the same, or as though it had been bequeathed to him by will." That one John Brill,

was appointed administrator of said estate, and took possession of it as such. That twelve months have elapsed since the granting of the letters ; that the debts are small ; and prays for distribution, and tenders a refunding bond.

The administrator answered and admitted most of the facts stated in the petition, but denied that the petitioner is a free man, and alleges that he is a slave, and belongs to the estate. The answer also alleges that one Zistine Joseph, claims the estate as heir, and that proceedings are now pending to establish his right ; it sets up also, as a defence, that until the right of the state of Mississippi, by escheat, had been ascertained, the petitioner had no claim, inasmuch as he could claim only the right which the state might have had by escheat.

The petitioner on the hearing, read an instrument in the French language, of which the following is a translation :

"On this day, the 24th of August, 1808, the widow of Antoine Bayard and Master Bernard Benoit, here appeared in my office of syndic and notary, attended by two witnesses, whose names are signed hereto, Messrs. Esprit Mathew Guglat and Valentine Frederique, witnesses of said woman, Antoine Bayard, who sells to said Master Bernard Benoit, a young mulatto, aged fourteen years, whom the said Bernard Benoit claims as his son, for the sum of 400 piasters, cash received. The said woman, Antoine Bayard, sells the said mulatto to the said Bernard Benoit, on the condition that on the moment of the sale, he shall acknowledge him free." This instrument was duly signed by the parties.

The instrument of manumission by Bernard Benoit, sen., signed by two witnesses, provided in substance, that from that moment he acknowledges the freedom of his son, according to the conditions of his purchase. The petitioner then produced the certificate of registry of the petitioner, as a free mulatto, in the probate court of Hancock county, and proved that he was recognized by the said Benoit, sen., as free, and that the administrator had not attempted to restrain his liberty, nor had him in possession.

The court dismissed the petition, on the ground that the

rights of the state had not been ascertained, and the petitioner appealed.

W. P. Harris, for appellant.

1. The first question to be noticed is that which is likely to arise in regard to jurisdiction of the probate court to determine the fact as to whether the petitioner below was a free man of color. In the form in which this question arose in the court below I think it was competent for that court to determine it.

The probate court is the proper place to seek distribution of the estate of an intestate; and it matters not whether the right to distribution is derived from birth, or from an act of the legislature; a party asserting such right must apply to this tribunal; on every such application, the probate court is called on to determine whether the petitioner is entitled to distribution, or in other words, whether the petitioner is the person he represents himself to be. In the present case, the petitioner represents that he is a free man of color, the natural son of the deceased, who died intestate and without heirs; that the legislature, by an act passed for his relief, conferred upon him the capacity to take the estate of his natural father, as an heir, and asks that it be decreed to him. The question arising on this state of facts is that which would arise on the application of an heir constituted in any other manner, and is simply whether the petitioner sustains the character he assumes. And the administrator could as well defeat the jurisdiction of the court on the application of any other heir, by simply asserting that he is a slave, as in the present instance. The question of freedom is an ingredient of, and incidental to the main question, determined on every application for distribution, and that is, "Is the person applying, an heir?"

There is nothing in the record to show that the petitioner below was a slave, except the simple assertion of the administrator in his answer; on the contrary it is abundantly proved that the petitioner was a free man of color. This point seems to have been yielded in the court below, and the decision of that court seems to have been based upon the position that the rights

of the state to the escheat should be first ascertained by a regular proceeding for that purpose, before the petitioner could assert his right to distribution.

Aside from this, however, the fact that the petitioner was a freeman is proved by the evidence introduced. He seems to have been regularly manumitted by a proceeding before a notary in 1808, under the Spanish law then in force in the country comprising Hancock county. By the Spanish law then in force, the appellant can claim his freedom on two grounds, first, the instruments of manumission, which are old enough to prove themselves, when taken in connection with the fact that the appellant had exercised his rights under them since their execution. Second, on the ground of prescription, having exercised the privileges of a freeman in the county where his father and pretended owner lived without restraint, for a period of time which entitled him to his freedom; and these rights attached anterior to the introduction of our state law on this subject, and are not defeated by them. For the Spanish law the court is referred to 1 Moreau & Carl. Partidas, 587 — 591. The proof further establishes that from the date of the instruments referred to up to the time of the proceedings below, the said Benoit had been in the full enjoyment of his rights as a freeman. These rights were acknowledged by Bernard Benoit senior, in his lifetime.

2. It is not pretended that the appellant is not the person for whose relief the act of 1844 was passed. Assuming this to be true, we are relieved from the objection named below in regard to the necessity of instituting proceedings to ascertain the escheat. No proceeding of the kind could be instituted in the name of the state, when the state by its own act creates and recognizes a legal heir, for it is only in the absence of legal heirs, that such proceedings are authorized.

The moment the incapacity of the appellant to inherit was removed, and the rights of the state conferred upon him, he occupied the footing of an heir, and the rights of the state ceased.

By the act of the legislature alluded to, the rights of lawful

Benoit v. Brill.

heirs are protected. The existence of such heirs would be a bar to the rights of the appellant. His petition asserts that there are no lawful heirs, and this allegation is not denied by the answer. The statement that there were persons claiming to be heirs was not sufficient to defeat the appellant; his petition should have been retained unless it appeared that there were legal heirs, which nowhere appears in the record. In this view of the case the court below erred in dismissing the petition, and certainly in basing its decision on the ground assumed.

E. Fourniquet, for appellee.

The only material question involved in this case is, whether, under the laws of this state, in relation to slaves, (How. & Hutch. 166, sec. 48,) the said slave (being claimed by the administrator as a slave belonging to the estate) could assert his freedom in any other way, or before any other tribunal than that of the circuit court, before which he should proceed by petition, as pointed out by the statute; and until he has pursued the remedy given to persons conceiving themselves illegally detained in slavery, and established his freedom thereby, he can neither claim property, nor be represented before the probate court.

Mr. Justice THACHER, delivered the opinion of the court.

The appellant filed a petition in the probate court of Harrison county to obtain his distributive interest in the estate of Bernard Benoit, senior, deceased. In this petition, the petitioner alleges that he is a free man of color, and the natural son of the deceased aforesaid, who died leaving no legal heirs; and that by an act of its legislature, the state of Mississippi granted to him all the right, title and interest which it had, by the law of escheat, in the estate of said deceased. The petition makes all other allegations required by the statute pointing out the mode and manner in which distribution of estates of deceased persons shall be authorized. To this petition the appellee, as administrator of the said estate, filed an answer and supplemental answer, which set up that the appellant was not a free man of color, but a slave, and the property of said estate; and that

there were persons claiming to be heirs of the estate of the said deceased. The appellant introduced in evidence an authenticated certificate of manumission, together with other evidence, to establish his freedom, and an act of the legislature of this state, entitled "An Act for the relief of Bernard Benoit, junior." Acts of 1844, c. 144. The appellee produced no evidence in his behalf. The probate court dismissed the petition.

At the expiration of the time restricted by the statute, the law makes it incumbent on a probate court to compel the distribution of an estate to the persons entitled and praying for the same, upon their first entering into bond and security. *Murdock Adm'r. v. Washburn et ux.* 1 S. & M. 546. Such an application can be made by and granted to an individual distributee, without joining his co-distributees, if such exist. The bond and security always required, are designed to protect the rights of such distributees as may subsequently make their claim good to distribution, as well as the rights of creditors of the estate. H. & H. 406, s. 70. The circumstance that other claimants to distribution of the estate existed in this case, was not a sufficient ground of objection to the appellant's petition.

In order to enable the appellant to have obtained distribution under his petition, it was incumbent upon him, under the statute, to show that he was entitled to it. *Ibid.* The issue as to his freedom must necessarily have been disposed of in some mode in the probate court. Perhaps the best mode, and one which might have prevented multiplicity of suits and litigation, would have been for one or the other party to have required the probate court to have sent that issue into the circuit court, as allowed by the statute, H. & H. 473, s. 17, 18. Enough evidence, however, seems to have been introduced on the trial below by the appellant to establish the character in which he prosecuted his petition; and no attempt was made by the appellee to contradict it.

The judgment of the court below is therefore reversed, the petition directed to be reinstated in the probate court of Harrison county, and the prayer of the petition allowed, upon peti-

tioner executing bond with security according to law in such cases, unless the other party require an issue to the circuit court.

It is perhaps proper to add that the judgment in this case is no bar to any proceedings which may be instituted hereafter by the administrator of the estate in question to obtain possession of the appellant as a slave, the property of said estate; and that it is not conclusive of the freedom of the appellant in any issue that he may hereafter be called upon to make or cause upon that inquiry.

ANN B. ROBINSON et al. vs. JAMES E. WHITE.

After a judgment by default upon due notice, on a three months' replevy bond for rent, a clear case of error must be made out to entitle the defendant to a reversal.

It is no objection to a three months' replevy bond for rent, that it does not recite to whom the rent is due; the obligor is estopped by the bond from denying that the rent is due; and if the bond be made payable to the constable, a payment to him before assignment will be valid; and so also will a payment to his assignee; and a motion and judgment on such bond by the assignee would be a bar to all future action upon it.

In error from the circuit court of Madison county; Hon. John H. Rollins, judge.

The defendant in error, made the following motion in the court below against the plaintiffs in error, viz.:

"James E. White, by his attorney, moves for judgment against A. B. Robinson and Edwin Moody, for debt, \$203.25, and damages, the interest on that sum from the 17th day of November, 1843, until judgment rendered. For that whereas, on the said 6th day of November, 1843, the said James E. White, sued out his attachment before James H. Boyd, a justice of the peace, for Hinds county, Mississippi, against the said A. B. Robinson, for \$203.25, for rent due and in arrear, which attachment was, on the 17th day of November, 1843, levied on certain personalty, the property of the said A. B. Robinson, by J. W. Fite, constable of said county. And whereas the said property was replevied by the said A. B. Robinson and Edwin Moody, (by the style of E. Moody,) making and delivering to said J. W. Fite, constable, (by the style of J. W. Fite, const.) their bond sealed with their seals, and here to the court shown, dated the 17th day of November, 1843, in the penal sum of four hundred and $\frac{99}{100}$ dollars, conditioned, that if the said A. B. Robinson, should well and truly pay the amount of two hundred

Robinson et al. v. White.

and three ²⁰⁰/₁₀₀ dollars, with lawful interest on the same, and all costs at the end of three months from the date of said bond, then said obligation to be void, otherwise to remain in full force and virtue. And whereas the said bond was on the 17th day of November, 1843, assigned and delivered to the said James E. White, by the said Joseph W. Fite, constable, (written const.) And whereas, the said sum of \$203.25, and interest and costs have not been paid, or any part thereof. Therefore the said James E. White, moves the court for judgment as aforesaid."

Notice that this motion had been filed, and would be tried on the 23d day of March, 1844, was served on both defendants on the 6th of March, 1844.

On the 23d of March, the motion was taken up, and judgment rendered for the plaintiff, for the debt and interest by default.

It is to reverse this judgment that the writ of error is prosecuted.

W. G. Thompson, for plaintiffs in error.

In the case of *Tooly et al. v. Culbertson*, 5 How. R. 272, it was expressly decided by this court, Chief Justice SHARKEY, delivering the opinion, that the proceedings previous to the bond, given by the defendant in attachment, form no part of the record, unless spread out in a bill of exceptions; that in such case the defendant's bond becomes the foundation of a new proceeding. It is contended, that the bond in this case is not sufficient to authorize the awarding of an execution thereon. It is the breach of the condition only which gives the party a right to his execution. But there is nothing in the condition of this bond, nor in its recitals, to show that ever James E. White had any transaction or contract for rent, or other thing with the plaintiffs in error. The condition is not to pay the amount of the bond to him. The bond does not recite that an attachment for rent was issued in his favor. The bond is assigned to him by the payee, Jo. W. Fite, const., (whatever such *soubriquet* be taken to mean); but he does not appear from the bond itself to have any connection with the cause.

How is it possible to say that the breach of the condition in this bond could give to the defendant in error a right to an execution? The bond itself, and that alone, as decided in 5 How. already cited, is the foundation of this cause. And in the bond must appear everything which can entitle the party to call for an execution. The bond appearing in court unsatisfied, the court will, on due notice given, award an execution; just as judgment will be rendered on a declaration. In both alike, the plaintiff's right must appear. Admitting that the condition of this bond has been broken, is there anything whatever to show that James E. White has been damnified? It is not payable to him, does not recite an attachment in his favor, the condition is not to pay money to him. The mere assignment to him, by the payee, gives him no right to call for an execution. The statute requires that replevy bonds, given on attachments for rent, shall be delivered by the officer to the lessors. And if it appears by the bond itself that it was given for the benefit of the party holding it, and who calls for an execution, the court is bound to award it in his favor. But the statute does not direct the officer to assign such bonds. And if a party claims an interest in the bond by virtue merely of an assignment under any other statute authorizing the assignment of bonds, he must assuredly proceed in the assertion of his rights in this case under such statute as in all cases of assigned bonds, by ordinary suit. For there is nothing whatever here, showing that he is entitled to the privilege granted by statute to lessors, in the mode of recovering rent. It does not appear that this bond was made payable to any officer authorized to take such bond.

D. Shelton, for defendant in error.

1. The whole argument urged for the plaintiffs in error, applies to the bond upon which the motion was founded, and not to the motion, or any proceedings thereon.

That bond is no part of the record. It is no part of the proceedings on the motion. It is the cause of action on which the motion is brought, and the foundation of the motion like a

promissory note, is the foundation of an action of assumpsit, or like this same bond, would be the foundation of debt brought thereon, and like the note, or the bond in debt, it is the evidence in the cause, not a part of the pleadings, or record therein.

2. But it may be asked if the motion be sufficient, and the bond not such as the statute requires, how shall the defendants make their defence. The answer is plain, such a state of facts would be a material variance between the bond offered in evidence and the description of it in the motion. And again on such a motion the statute would allow no such bond to be read in evidence as was then offered; for either of these reasons, therefore, the evidence would be excluded, or before the court, either would be good cause why the judgment should not be rendered for the plaintiff on the motion; but if the court erred, exceptions could be taken to the judgment of the court on the evidence given, and by the exceptions the whole of the evidence be made part of the record, and revised by this court. Such would be the proper practice, any other would be loose and informal and tending to confound the evidence in the cause with the pleadings thereon.

3. But admitting the bond to be a part of the record, it is in accordance with the statute, it is made payable to the officer levying the attachment, and by him assigned to the landlord. The bond is properly taken, and the assignment transfers the right of action. 7 How. R. 254, 248; 5 How. 272. The statute requires that the bond shall mention that the same was entered into for goods distrained for rent, and restored to the debtor, and that before the three months expire, it shall be delivered to the lessor for whom distress was made. H. & H. 559, § 48. Every one of these requisitions are complied with in this case. But it is urged that the bond should have recited for whose benefit and in whose favor the attachment was levied. The statute makes no such requisition, nor is such a recital necessary to determine the rights of the parties; the defendant executes the bond, knowing for whom the distress is made by such bond; he acknowledges the rent to be due to the lessor

distraining. 5 How. R. 271. Any description therefore of the attachment that is levied, would be wholly superfluous, and any variance, however material, between the attachment levied and the description thereof in the bond, would not vitiate the bond, because the whole recital would be superfluous. It is sufficient to recite that the bond was entered into for property distrained for rent, and the court would not refuse to give efficacy to the bond, because it contained a superfluous recital. To sustain such objections would be to sacrifice the ends of justice to its forms. 7 How. R. 248.

4. But I farther contend that, for the purpose of showing for whose benefit the breach of the condition of the bond accrued, we had a right to read, on trial of the motion, the whole proceedings in the attachment cause, and also the assignment of the constable on the bond itself, and that such showing was as good evidence in that court as a recital of the facts in the bond itself would be, and indeed better, the recitals being but admissions, the other being record evidence of the same facts; and upon the other hand, the defendants might have read these proceedings to show any fact there shown material to their defence, and to the judgment of the court thereon either party might except and by his bill bring up that evidence to this court. 5 How. 272.

But this court must make all presumptions in favor of the judgment of the court below. It must therefore presume that all these things were read in evidence below, and read without objection by the defendants, and if so, the objection cannot be made available here.

Mr. Justice CLAYTON, delivered the opinion of the court.

This was a motion in the circuit court of Hinds county, against the plaintiffs in error, upon a replevy bond, executed by them for the release of property taken under a distress for rent. The obligors were duly served with notice of the motion, but they did not appear, or make defence, and afterwards sued out this writ of error.

Under these circumstances, a clear case of error must be made out, to entitle a party to a reversal. The principal cause relied on as error is, that the bond does not recite to whom the rent is due. It is made payable to the constable who levied the attachment, recites the amount of rent that is due, and undertakes to pay at the end of three months. It is assigned to the defendant in error. It estops the obligors to deny that the rent is due. 5 How. 271. There can be no doubt, that if payment had been made to the constable, before the assignment, it would have been a valid discharge of the bond. So if made to White after the assignment. The proceedings in this case would likewise be a bar to all future action upon it. Moreover the statute does not require such recital, and it is not for us to add to its requisitions or impose new terms.

The judgment will be affirmed.

JAMES GRAVES vs. JULIUS C. MONET.

Unless a bill of exceptions be signed by the judge, it will not, though spread out in the record, be noticed.

Although persons not of the jury intrude upon them in their retirement, and one of the jury during their retirement separate himself from his fellows for a period, yet these facts, though irregularities and reprehensible, will not be grounds for reversing the judgment, when it does not appear of record that any influence was attempted on the jury or the absentee, to procure the verdict rendered by them.

In error, from the circuit court of Hancock county; Hon. V. T. Crawford, judge.

Julius C. Monet sued James Graves, in detinue, for the slave Lorant. Various pleas were filed, and issues taken; and the cause was submitted to a jury, who found for the plaintiff below. There is spread out in the record a paper purporting to be a bill of exceptions to opinions of the court on the trial, in which, what purports to be the evidence for the plaintiff is embodied; but this paper is not signed by the judge; it is sealed, but the signature is blank. There appears also in the record what is termed the protest of John Henderson, Esq., the attorney for Monet, against the judge below signing the bill of exceptions offered, without it was amended in its recital of the facts; and the protest contained what it stated was a correct recital of the facts in the points in which the bill of exceptions was alleged to be defective. This protest was signed by two members of the bar, who were not attorneys in the case. The defective bill of exceptions and this protest are not further noticed, as they were disregarded by this court.

There was another bill of exceptions, duly signed, taken to the refusal to grant a new trial; in which was spread out the following affidavit, signed by four of the jurymen, viz.: "After

the jury left the court to consider of their verdict, and while considering of their verdict, and before the said verdict was agreed on, sundry persons, not of the jury, passed into the jury-room; and further, that one of the jurors left the jury-room and absented himself from the jury for some time, while said jury were considering of their verdict."

The court below overruled the motion for a new trial, and the defendant prosecuted this writ of error.

W. P. Harris, for plaintiff in error.

(Mr. Harris's argument was directed entirely to the questions presented by the first bill of exceptions, and is not therefore inserted.)

Montgomery and *Boyd*, for defendant in error.

Was it error to refuse the new trial, because of the supposed irregularities or misconduct of the jury? We think not.

The evidence in support of that part of the motion, certainly throws no suspicion on the verdict. As to the first part of it, there is no pretence that the persons who "passed into the jury-room," interfered in any way with the jury, or that they remained there any time, or in fact that they were not rightfully there. It is said they were not "of the jury," but they may have been the officers of court, the sheriff and his deputies, or the judge. It may have been, that these persons passed through the room in leaving the court-room, or were directed to go that way by the court, and under the charge of officers. Until it was positively shown that there was some interference with the jury, or tampering with their verdict, the court was not bound by law to set aside their verdict. *Graham on New Trials*, ch. 4, pp. 63-91.

As to the other part of this assignment, it may be admitted that a juror ought not to leave the jury-room till the deliberations of the jury are concluded. The act may subject him to censure and perhaps to penalties, under certain circumstances, but will not necessarily affect the verdict. And in this case, the affidavit does not show that, in leaving the jury-room, the

juror went out of the house or into the presence of any persons other than the jury. The verdict will not be disturbed without positive evidence of misconduct, and of so gross a character as to lead to the reasonable conclusion that the finding of the jury has been produced by improper influences. Nothing of the kind appears here; the showing of the affidavit scarcely lays the foundation for an unfavorable inference. *Graham on N. T.* 82, 84, 85, 87.

We consider it also inadmissible to call the jurors to impeach their own verdict; for at last it leaves a case of oath against oath.

Mr. Justice THACHER delivered the opinion of the court.

Monet instituted an action of detinue in the circuit court of Hancock county, to recover a slave from Graves. A verdict was rendered for Monet, and thereupon Graves sued out a writ of error.

In this case, there is either a diminution of the record, or, if perfect, it does not present legitimately all the facts as descanted upon by the counsel for the plaintiff in error in his brief. The first bill of exceptions extends to the close of the testimony in behalf of the plaintiff below. This bill of exceptions, although treated as having been signed by the court, as appears by rather an anomalous document in the record, filed as a protest of counsel against its being signed by the court, has not, in point of fact, the signature of the court. However the fact may be, we must be controlled by the record, and are therefore compelled to disregard the first bill of exceptions. The second bill of exceptions, in consequence of this defect of the record or circumstance in the case not containing the whole evidence of the cause, we are obliged to look at the case only with reference to such points as are prominent enough of themselves to raise a question respecting the propriety of the judgment. These points are the incidents, that the jury in their retirement were intruded upon by strangers to their body, and that one of their number, during their retirement, separated himself for a period from his fellows, as appears by the affidavits of some of the

jury. There is, however, no statement in the record that an improper or any influence was attempted upon the jury or the voluntary absentee, to procure the verdict rendered by them. Although both the circumstances were irregularities, and therefore reprehensible, they do not warrant the setting aside the verdict. Graham on N. T. 91, 92.

Judgment affirmed.

LYDIA A. BARROW, Administratrix of William Barrow, vs.
WILLIAM WADE, Use, &c.

Where, in an action against an administrator, as such, the judgment is rendered *de bonis propriis*, this court will reverse the judgment; but will render such judgment as the court below ought to have rendered.

Where a writing obligatory, made by two, is sued upon but only one of the obligors sued, and two pleas are filed, the first alleging payment by one obligor and the other alleging payment by the other obligor, and a single replication professing to answer both pleas, was filed, on which the defendant took issue, and a verdict was rendered for the plaintiff; it was *held*, that though the replication was defective, yet the mispleading was cured by the verdict, by virtue of the statute of jeofails. The defendant should have demurred.

IN error, from the circuit court of Madison county; Hon. John H. Rollins, judge.

William Wade sued Lydia A. Barrow, administratrix, &c. of William Barrow, deceased, on a writing obligatory, made by William Barrow and Samuel Barrow. The defendant plead two pleas; first, payment made by the intestate, in his lifetime; and second, payment by his obligor, since the death of her intestate. The plaintiff filed the following replication to these pleas, viz.: "And as to the first and second plea, said plaintiff says *precludi non*, because he says that the debt, in his declaration mentioned, has not been paid by the said Samuel Barrow, the joint and co-obligor of said William Barrow, deceased, as is in said plea set forth, and of this he puts himself upon the country, &c." To this plea the defendant added a *similiter*; and the cause was submitted to a jury, who found a verdict for the plaintiff; upon which the court below rendered this judgment, viz.: "It is therefore considered by the court, that the said plaintiff recover of the said defendant the debt

and damages aforesaid, also his proper costs, by him in this behalf expended."

The defendant sued out this writ of error.

D. Mayes, for plaintiff in error.

The judgment must be reversed, because,

1. It is against defendant, *de bonis propriis*, which is error. *Hill v. Robinson*, 2 S. & M. 541; *Brackenridge's Administrator v. Mellen's Administrator*, 1 How. 273; *Neely v. Planters Bank*, 4 S. & M. 113, (dictum.)

2. Because the replication to the first and second plea only traverses the facts plead in the second plea, and puts in issue nothing but the payment by Samuel Barrow, since the death of William Barrow. And the issue is immaterial, being found for the plaintiff, though it would have been material had it been found for the defendant. For, had the verdict been for the defendant, it would have ascertained the fact that Samuel Barrow had paid the debt, since the death of William Barrow; and this would have been a good bar. But, being found for the plaintiff, it only ascertains that Samuel Barrow had not paid the debt, since the death of William Barrow. This may be true, and yet the plaintiff have no cause of action, for Samuel Barrow may have paid before the death of William, or William may have paid in his lifetime, or the administrator may have paid after his death.

This is, in principle, like the case of *Fletcher v. Henington*, 2 Burr. 944. In that case debt was brought on a bond, payable *on or before* such a day. The defendant pleaded payment at a day *before* the day specified. Plaintiff demurred, and it was contended, in argument, that the judgment should be for the plaintiff, as the issue might be immaterial if found for him, though it would be material for defendant if found for him.

But the court decided that the plea was good, and that the plaintiff should reply, "That it was not paid at the particular day mentioned in the plea, *nor at any time before or after that day*," and this will bring the point to the material and proper

issue, "whether it has been ever paid at all, or not." And see Esp. N. P. Part 2d, 62.

But be this as it may, so far as it concerns the second plea, the replication does not at all put in issue any part of the matter plead in the first, even were it proper to make one replication to two pleas.

McBride, for defendant in error.

1. There are but two pleas in the record, and the replication says, "as to the first and second pleas said plaintiff says," &c. If the replication was insufficient the defendant should have demurred. Having failed to do so, the defect, if any, after verdict, is cured by the statute of jeofails. *Christian v. —*, 2 How. 863; *Smith v. Ware*, Ibid. 895; *Raysdale v. Caldwell*, Ibid. 930.

2. An error assigned is, that the judgment is *de bonis propriis*, when the suit is against the defendant below, as administratrix. Although this court have decided this to be error, in the case of *Hill v. Robinson*, 2 S. & M. 541, and *Neely v. Planters Bank*, 4 Ibid. 273, still, this court will be bound by the statute, (How. & Hutch. 532,) to pronounce such a judgment as the court below should have rendered. For the judgment, as rendered, was clearly a clerical error, and should have been *de bonis testatoris*.

3. Although, strictly, the replication was not good, and if the defendant had demurred, the replication would have probably been held bad. Yet, as he failed to do so, the defect is clearly cured by the statute of jeofails, after verdict. See cases cited above.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

It is first insisted that this judgment should be reversed, because it was rendered against the defendant to be levied *de bonis propriis*, when it should have been to be levied *de bonis testatoris*. This is an error for which it must be reversed; but this court may proceed to render the proper judgment on the verdict. *Hill v. Robinson*, 2 S. & M. 541.

It is also insisted that one of the defendant's pleas is unanswered. The writing obligatory sued on was made by the intestate, William Barrow, jointly with Samuel Barrow, who was not sued. The defendant pleaded, first, payment by William Barrow, in his lifetime, and second, payment by Samuel Barrow, since the death of William. There is but one replication, which begins as an answer to both pleas, but which, in truth, traverses the payment by Samuel Barrow only, and concludes to the country, on which the defendant took issue. The replication was defective, because it professed to answer two pleas, which cannot be done by one replication. But as it professed to be an answer to both pleas, and the defendant took issue, it can only, after verdict, be regarded as misleading, or insufficient pleading, and cured by virtue of the statute of jeofails. The defendant should have demurred.

Judgment reversed, and rendered in accordance with the foregoing opinion.

RICHARD M. GAINES et al. Administrators of Samuel Hunter, deceased, vs. ALEXANDER SMILEY.

After distribution of the estate of a deceased person under an order of the probate court, the superior court of chancery has not jurisdiction of a bill by a person alleging himself to be a distributee, whose claims had been overlooked or disregarded in the distribution in the probate court, against one of the other distributees to recover from him a ratable proportion of the estate. The remedy was in the probate court.

ON appeal from the superior court of chancery ; Hon. Robert H. Buckner, chancellor.

Richard M. Gaines and Augustus E. Addison, administrators of Samuel Hunter, exhibited their bill of complaint in the superior court of chancery, stating that Samuel Hunter removed from Ireland into this state in 1824, obtained letters of naturalization, and married Susannah, the daughter of John and Susannah Bisland, who then resided in Adams county in this state ; that Mrs. Hunter died in 1825, leaving only one child, Catharine Ann, the issue of her said marriage. That Catharine Ann died in 1827 ; Hunter returned to Ireland, and there died in 1830, having first made and published his last will and testament, appointing John Hunter, Edward Reed and Samuel Sproul, of Ireland, his executors and trustees of all his estate in that country and elsewhere ; who proved said will and obtained probate thereof in the high court of prerogatives in Ireland. Said trustees executed a power of attorney to complainants, requesting and authorizing them to administer on the estate of Hunter in Mississippi ; and complainants accordingly obtained letters of administration in Adams county, in 1839, and have continued ever since in the administration of said estate. That in the year 1821, John Bisland departed this life in Adams county, leaving by his last will and testament certain slaves to his wife,

said Susannah Bisland, during her natural life; remainder to his own children. That these slaves remained in the possession of Susannah Bisland till her decease, which occurred in Adams county in the year 1836. That the probate court of Adams county, at the March term, 1836, appointed commissioners to make division and allotment of said slaves; and they divided the property into six equal parts, allotting the same to the surviving children and representatives of children of said John Bisland. That no provision was made in the division and allotment for the representatives of Mrs. Hunter, who was one of the children of said Bisland. Complainants state that they suppose this omission occurred through a mistaken belief on the part of the commissioners that there were no representatives of Mrs. Hunter living. That seven of the said slaves were allotted to Alexander Smiley, the defendant, as the only heir of one of the deceased children of the said Bisland. That these slaves, when received by the defendant, were worth seven thousand dollars. That the defendant has refused to make contribution to complainants out of said distributive share received by him, and they pray for an account to be taken as to the value, &c. of the slaves received by the defendant, and that he be decreed to pay to complainants one-seventh part of their value.

The defendant demurred generally to the bill; demurrer was sustained, the bill dismissed, and the plaintiffs appealed.

W. G. Thompson, for appellants.

John Bisland died in 1821. His children then living took by his will a vested interest in the slaves which he bequeathed to Mrs. Bisland during her lifetime, remainder to his children. Mrs. Hunter was one of his children, and took a vested interest. Upon her death in 1828, her interest passed to her surviving child, Catharine Ann. Upon the death of this child in 1827, its interest passed to its father, Samuel Hunter. He held a vested interest, which, at his death in 1830, passed to complainants, as his representatives in law.

It is deemed unnecessary to cite authorities to show that the children of John Bisland took a vested interest in the property

immediately under his will. The only question, it seems, is as to the jurisdiction of the court of chancery. There is no remedy at law. The complainant's right is to an undistributed share of part of Bisland's estate. This is an equitable, not a legal right. The remedy is in chancery, or in the probate court. There is no mode in which complainant's right can be asserted in the probate court. The bill alleges that John Bisland's estate has been finally settled. And whether this be the fact or not, the probate court has no jurisdiction over the defendant in regard to the subject of controversy here. It has had no jurisdiction over him in regard to this subject, except in the proceedings had there on the application made under the statute for distribution. The proceedings for that object have closed, and the jurisdiction has ceased. The remedy is not by appeal; complainants admit that the probate court acted without error upon the facts before it. A bill of review cannot be maintained except by parties to the order or decree. And this court has decided, in several cases, that a bill will not lie in the probate court. There is no other conceivable mode of obtaining relief in that court. The remedy is in chancery, where the defendant will be held a trustee as to complainant's interest in the slaves he has in possession as distributee.

There may seem a little vagueness on the record in the figures designating the year of John Bisland's death. I will state that I drew the bill, and the intention was to state 1821.

Hughes, for appellee.

The court of chancery had no jurisdiction of the case; it belongs to the probate court, which yet has jurisdiction of the subject-matter. If a decree has been rendered in that court by which a partition has taken place between persons not entitled, or between less persons than are entitled, and the person now claiming was a party to those proceedings, he should have taken such steps as would have enabled him, in a court of appeal, to correct the error committed by the court. But if he was not a party, was not before the court, and had no notice, he was and is not bound by the decree; and if he is entitled, the pro-

ceedings are liable to be reviewed and reversed. He may go into the said probate court and petition, and under the statute plenary proceedings may be had. In fact, the same relief may be had in that court that could be had in this, had a decree been rendered here which affected the estate of a person not a party. As, for instance, in the familiar case mentioned in the books of practice, where a decree has been rendered against a trustee, without making the *cestui que trust* a party. The *cestui que trust* may file a bill and impeach the decree on the ground of fraud. This might be done in the probate court. There is no reason why it was not so done. It is submitted that the demurrer ought to be allowed, and the bill dismissed.

This court has decided, that a bill of review cannot be filed in the probate court. This, however, does not make the complainant's case any better. He should have applied for his distributive share, and having failed, he is like other persons in default. He must take the consequences of his laches. If he has slept on his rights until the administration has been closed in the probate court, it is not the fault of the defendant. To give him aid in a court of equity on this ground would be establishing a new ground or cause for coming into a court of equity, that of *negligence*.

Mr. Justice CLAYTON delivered the opinion of the court.

After distribution of the estate of a decedent, under an order of the probate court, this bill was filed by the appellants in the superior court of chancery against one of the distributees, to recover from him a ratable proportion of the estate, to which they alleged their intestate was entitled, and whose claims had been overlooked or disregarded in the distribution. To this bill a demurrer was filed, which was sustained by the court, and the bill dismissed.

According to the well-understood powers of the probate court, under repeated decisions of this court, it has exclusive jurisdiction over the distribution of the estates of intestates. If in this instance error was committed to the prejudice of the

Gaines et al. v. Smiley.

appellants, their remedy was not by original bill in chancery against one or more of the distributees.

The decree of the court below was correct, and must be affirmed.

PETER G. JOHNSTON vs. THE STATE OF MISSISSIPPI.

A grand jury composed of all the regular venire in attendance on the court, being twelve in number, and two persons summoned by the sheriff, under the direction of the court, from the bystanders, is a good and legal grand jury.

The case of *Thomas Dowling v. The State*, (5 S. & M. 664,) cited and affirmed.

In an indictment under the act of 1839, chap. 26, entitled "An act further to suppress and discourage gaming," it is not necessary to state the individual game of cards played; the charge that the defendant "did play at a game at cards for money," is sufficiently definite for any reasonable or legal purpose.

ERROR from the circuit court of Hinds county; Hon. John H. Rollins, judge.

This was an indictment found by the grand jury of Hinds county, against Peter G. Johnston. The charge contained in the indictment was in these words, to wit: "That Peter G. Johnston, late of the county of Hinds aforesaid, laborer, on the thirtieth day of May, in the year of our Lord one thousand eight hundred and forty-three, in the county aforesaid, did play at a game at cards for money, contrary to the form of the statute." The jury found the defendant guilty, and he was fined by the court twenty dollars. The bill of exceptions filed by the defendant discloses the following state of facts, to wit: when the regular venire was called, but twelve persons summoned as venire-men answered; whereupon the sheriff, under the direction of the court, summoned two persons from the bystanders, who, together with the twelve venire-men, were drawn and sworn as a grand jury, &c. On the trial, the district attorney proved, that at sundry times in the fall of 1842 and spring of 1843, the defendant had played at games of cards in Cayuga, Hinds county; that he played, as the witnesses con-

Johnston v. The State of Mississippi.

sidered it, for pastime or amusement; the game played was usually Seven up, and the bet from a dime per game to several dollars, which was generally laid out in a treat. Which, being all the evidence, the defendant moved the court to instruct the jury, "that they ought to find for the defendant." The court overruled the motion, and the defendant excepted. The jury found a verdict of guilty, and the defendant entered a motion in arrest of judgment; the motion was overruled by the court, and the defendant now prosecutes this writ of error.

Daniel Mayes, for plaintiff in error, contented,

1. The indictment should have been quashed, because there was no grand jury legally empanelled and constituted, and cited *Laws of Mississippi*, from 1824 to 1838, p. 578; *Noy's Maxims*, 9th ed. p. 4; *Staniland v. Hopkins*, 9 M. & W. 192; *Dwarris on Statutes*, 48; *Rex v. Daniel*, 7 B. & C. 569; *Rex v. Ramsgate*, 6 B. & C. 712; *Rex v. Inhabitants of Great Bentley*, 10 B. & C. 527; *Best, J. in 3 Bingham*, 196.

2. The indictment is bad on its face, because it does not charge the general name of the game at which the defendant may have played. If the statute dispenses with all identification of the offence, it is unconstitutional. 10th sect. of 1st art. of the Constitution of the state of Mississippi; 3 *Story's Com. on the Constitution*, 661; 2 *Kent's Com.* 3d ed. 12; Sect. 12 of art. 1 of Constitution of Miss.; 2 *Russell on Crimes*, 659; 3 *Story on the Constitution*, 658, 662.

Franklin Smith, for the state.

Indictment making the charge in the language of the statute creating an offence, in general language, is good. 6 *Cowen*, 296, 293; 12 *Wendell*, 431; *King v. Holden*, *Crown Cases Reserved*, 116. In the latter case the indictment charged, in the general language of the statute, that the defendant did "feloniously dispose and put away a forged bank note," without stating in what manner, to whom, or what bank the note was of. The twelve judges unanimously held the indictment good, because the statute created a new offence, and the offence was a

substantive one. No matter to whom the bank note was passed. So in these cases, no matter whether defendants played at pool, whist, uker, poker, or any other species of games at cards, it was equally an offence created by statute; they were advertised by the indictment of the offence, and they were called upon to defend themselves against having played at any game at cards whatever for money. *Noonan v. The State*, 1 S. & M. 562, 563. This court has decided all the questions raised against the principle of these indictments in favor of the state. 1 Chit. 281, 282, 286, 288. See 3 Gill & Johns. R. 310, 311.

I submit that at common law the *forms* require the species of game to be mentioned; it was to obviate this that the statute, sect. 85 How. & Hutch. 684, was passed. That section declares that it shall be sufficient to charge the general name of the game. Now there are three general names of games mentioned in sect. 79, H. & H. 683; cards is one general name, dice another, and billiards another. Now to say that whist, yuker, brag, &c. shall be named, would be to say that the species of game shall be named and not the general name. So of billiards, the rub, pool, the long hundred, or the thousand other varieties known to gentlemen of pleasure, but not to the grand jury; the statute declares these species of the generic terms games at cards, dice, billiards, need not be known to the grand jury, but that they may find a bill against the offender for playing at cards, dice, &c. by the general name of the game at which he played.

This court, in the case of *Noonan v. The State*, 1 S. & M. 562, ruled that it was not necessary to charge in an indictment for violating the license law of 1842, the kind of spirits sold, nor the name of the master of the slave to whom the liquor was sold; and the court sustained the law of 1842 as constitutional. That was a much stronger case for defendant than this, and a much broader law in the humble judgment of the undersigned. Before the court can declare these indictments insufficient, they must reverse the decision in *Noonan v. The State*, and also declare the 85th sect. of the gaming act, H. & H. 684, unconstitutional. That section declares the gaming acts remedial acts

and not penal; they should therefore be construed liberally. 6 Cowen, 293; 15 Wend. 280.

The court is forbidden to quash the indictment — sect. 85, H. & H. 684, binding on the court. 1 Chit. 303.

As for defendants being liable to be indicted twice, to be found guilty on a charge different from the one made by the grand jury, these are contingencies and possibilities that the court is bound to presume were as fully in the contemplation of the legislature as they can be before the mind of the court. The law-making power has nevertheless passed the act, and for the court to disobey would be to exercise a legislative authority by repealing instead of expounding the law. Unless the act is clearly unconstitutional, the court will never disobey it.

To all the fanciful possibilities of being tried twice, convicted on a charge different from the one preferred, it is sufficient to answer, that defendants have been fairly tried; that they are not by these indictments in danger of suffering twice for the same offence; that when they are indicted again, there would be a time for their complaints; and doubtless, could such a thing be possible, if there were the least doubt on the mind of the court, under plea of former acquittal the circuit court would direct an acquittal, and if it did not, this court would. But all these remote dangers must have been in the contemplation of the legislature; and yet, in the language of 6 Cowen, 293, "to suppress a great mischief," they have declared a penal statute shall be remedial in its construction, and that other mischiefs to citizens shall be hazarded (if such things could possibly be in our country,) for the purpose of securing the good of society, and of totally putting down a fascinating vice.

I should deem it derogatory to this court, were I to press any consideration further of the cases than only to say, in conclusion, that I deem the sole point that can be argued at all, is, — is the law, H. & H. 684, sect. 85, constitutional? And that it is, this court has clearly decided in 1 S. & M. 562, to which the court is again referred.

I would also refer the court to the sections of the license law,

pronounced constitutional by this court, in the case of *Noonan*, above referred to, which will be found much wider of the common law particularity, than the gaming statute law of 1842, sects. 5 and 8, pp. 111, 112, chap. 10.

Mr. Justice THACHER delivered the opinion of the court.

The plaintiff in error was indicted in the Hinds county circuit court, under the act of 1839, ch. 26, entitled "an act further to suppress and discourage gaming." A verdict of guilty was rendered upon the indictment.

The first point made in the case was considered and decided by this court in the case of *Thomas Dowling v. The State*, 5 S. & M. 664. This point had reference to the mode in which the grand jury were empanelled, and was determined unfavorably to the position assumed by the plaintiff in error in this case.

Another point in this case is made as to the sufficiency of the indictment. The indictment charges, that the defendant "did play at a game at cards for money." It is objected, that this description of the offence is not sufficiently certain, and that it should have set forth the name of the game at cards played by the defendant. The statute H. & H. 683, sect. 79, enacts that "if any person or persons shall encourage or promote any game or games, or shall play at any game or games at cards, &c. for money, &c.;" and the same statute, H. & H. 684, sect. 85, provides, that in all cases arising under this or any other act to suppress gaming, it shall be sufficient to charge the general name of the game at which the defendant may have played, without setting forth or describing with or against whom he may have played or bet. In Tennessee, the statute against gaming, Act 1799, chap. 8, sect. 2, is nearly word for word similar to that of Mississippi. In the case of *Dean v. The State of Tennessee*, Martin & Yerg. R. 1, 127, the indictment charged that Dean "did unlawfully encourage and promote a certain unlawful game and match at cards for money, and unlawfully did play for and bet money at the said game and match at cards," &c. An objection was raised to the insufficiency and uncertainty of the

charge in the indictment, in not specifying the particular game played at for money, and the amount of money bet. The court held the allegation in the indictment to be sufficient. In the case of *Montee v. The Commonwealth*, 3 J. J. Marshall's R. 135, it was decided that the word "cards" identifies the specific game played, and that the individual game of cards played need not be stated.

We are disposed to think that the allegation in the indictment that the defendant "did play at cards for money," is sufficiently defined for any reasonable or legal purpose; for "it may be," as was said by Judge Peck, in the case quoted above from *Martin & Yerger's Reports*, "that adepts at gaming play for money without any game, where their invention for names has been exhausted."

Judgment affirmed.

CALVIN DAVIS and ELIZABETH M. DAVIS vs. AMOS S. FOY.

It was settled at common law, that the contract of a married woman is void, and the act of 1839, familiarly known as the "woman's law," does not extend her power of contracting, or of binding herself or her property.

The effect of the act of 1839 is rather to take away from a married woman all power of subjecting her property to her contracts, except in the particular mode specified in the statute.

A judgment cannot be rendered in a court of law against a married woman on a promissory note made by her husband and herself.

ERROR, from the circuit court of Carroll county; Hon. Benjamin F. Caruthers, judge.

This was an action of assumpsit brought by Amos S. Foy to the April term, 1845, of the circuit court of Carroll county, against Elizabeth M. Davis and Calvin Davis, founded on their joint and several promissory note for the sum of one thousand and twenty dollars, dated the 21st day of November, 1843, and payable on the first day of January, 1845. The defendants filed three pleas, non assumpsit, payment, and want of consideration. The plaintiffs took issue on the first, replied to the second, and demurred to the third. The demurrer to the third plea was sustained by the court, and leave given to the defendants to answer over. On the trial the plaintiff's counsel read to the jury the note sued on, and rested his case. The defendants then proved that Elizabeth M. Davis was the lawful wife of Calvin Davis at the time she signed the note sued on, and at the time of the trial. Other evidence was also introduced, which it is deemed unnecessary to notice here, as it did not at all bear on the point upon which the opinion of the court turned. After all the evidence was concluded, the defendants asked the court to instruct the jury "that if they believe, from the evidence in this cause, that defendant, Elizabeth M. Davis, was a married woman at the time the note sued on was executed, they

cannot find a verdict against her." The court refused to give the instruction, and the defendants excepted. Verdict and judgment for plaintiff. The defendants removed the cause to this court by writ of error.

William and William G. Thompson, for plaintiffs in error.

It was manifestly error to render judgment against E. M. Davis, a married woman when the note was executed.

It was error to render judgment on verdict against E. M. Davis, there being no plea, and therefore no issue, as to her. If this court will presume there was a plea by her, inasmuch as the suit was contested as to her before the jury, then it was manifest error to refuse the instruction asked.

In reversing the judgment, the cause will be remanded as to both defendants, or judgment rendered for them by this court, for it would be wrong to enter judgment by default against E. M. Davis, who was proven in this cause to be a feme covert when the note was executed; an action cannot be maintained against C. Davis jointly with a feme covert.

Coverture of the defendant may be proven under the general issue. 1 Chit. Pl. 476; 1 East R. 432.

The affidavit of Calvin Davis, which was permitted to go as testimony before the jury, proves that the note sued on was signed by him, not as a party to the contract, but only as surety at the most, for Mrs. Davis. And that the contract was made entirely between the plaintiff and her. If she, as principal, is not liable on the contract, the surety cannot be held liable.

The third plea states in substance, that the note was given for the purchase-money of land, for which the plaintiff was to give a title bond, which he has failed to do. It is insisted that the contract is void, upon the facts stated, under the statute of frauds; and that the defendants having nothing by which to hold the plaintiff liable, there is a want of mutuality, and he cannot hold them liable; and so the plea is good.

Sheppard, for defendant in error.

The leading and principal question in this case arises upon

the refusal of the court to instruct the jury that if the "defendant at the time of making the contract was a feme covert, that she was not liable.

The proof shews that the note was given for a tract of land sold to E. Davis, in this state, in 1842, with the assent and concurrence of her husband.

The disability of the wife to contract by the common law was not for want of proper discretion on her part, but because *baron* and *feme* are regarded as one person, and all the personal estate of the wife, which she has at the time of marriage, or which may be subsequently acquired, belongs to the husband. The law will not allow her to contract, while it deprives her of the means to discharge the obligation. 2 Kent's Com. 149.

This is further illustrated from the principles adopted in equity in relation to the contracts of the wife. It is true the court does not decree it as a personal obligation, but if she has a separate estate the court will hold the obligation valid, and charge it upon her separate estate in the nature of an appointment.

The statute of 1839, known as the law regulating and declaring the rights of married women, has not only reversed and changed the common law rule in reference to the marital rights of the wife to the personal property held at time of marriage, and which may be acquired during the coverture, but it expressly gives her a power and legal capacity to contract.

She can acquire property real or personal during the coverture, by gift, succession, or purchase. Purchase, as a general term, embraces every mode of acquisition, but in the specification made by the statute, it is intended as a bargain and sale.

The wife having a legal capacity to contract, may sue and be sued as a *feme sole*, as if the husband be banished the realm, or an alien living abroad. 2 Kent's Com. 154. *Darby v. Duchess of Mazarine*, 1 Lord Raym. So also in the case of a *feme covert* acting as a trader under the custom of London. Clancy on Husband and Wife, 50 — 70.

Equity relieves solely on the ground that the contract of the wife does not create a personal obligation, and that in conse-

quence the creditor would be remediless in the courts of law. 2 Story's Eq. 628.

Mr. Justice CLAYTON, delivered the opinion of the court.

This was an action in the circuit court of Carroll county against the plaintiffs in error upon a note executed by them jointly. The action was assumpsit, and the fact that the defendants were husband and wife was fully established. Upon the trial, the court was requested to instruct the jury, "that if they believed, from the evidence, that the defendant, Elizabeth Davis, was a married woman at the time the note sued on was executed, they could not find a verdict against her." This charge was refused.

It was settled, at common law, that the contract of a married woman is void. Clancy on Hus. & Wife, 23. Lord Kenyon laid down the rule thus emphatically: "If any one proposition in the law can be more clear than another, it is this, that an action cannot be brought against a *feme covert*, except by the custom of London. A court of law cannot get at the property of the wife, if she have any." *Clayton v. Adams*, 6 T. R. 604.

In the exposition of our statute, called familiarly the married woman's law, it has already been decided, that it has not the effect to extend her power of contracting, or of binding herself or her property. Its effect rather is to take away all power of subjecting her property to her contracts, except in the particular mode specified in the statute.

The judgment being against both, must be reversed and the cause remanded, for such further steps as the plaintiff may choose to take.

Judgment reversed.

FROST & Co. vs. WILLIAM G. DOYLE AND JANE DOYLE.

The general rule at common law is, that a *feme covert*, having a separate estate, acts with regard to it as a *feme sole*; but that rule is changed by the act of 1839, of this state, which provides that the slaves owned by a *feme covert*, under the provisions of that act, might be sold by the joint deed of the husband and wife, executed, proved, and recorded, agreeably to the laws then in force, in regard to the conveyance of real estate of *feme coverts*, and not otherwise.

Since the act of 1839 a *feme covert* cannot convey, or incumber, or charge in any manner, her separate personal estate, in any other mode than that pointed out by that act; therefore slaves, the separate property of the wife, cannot be subjected to the payment of a note made jointly by the husband and wife, not even if the note were given for articles necessary for the plantation and housekeeping purposes.

F. & Co. filed a bill in the district chancery court, against D. and wife, alleging that D. and wife had purchased from them a quantity of merchandise, comprising articles necessary for the use of the plantation, and housekeeping purposes, for the payment of which, on a settlement of the account, they executed their joint note; that the wife of D. owned sundry slaves, given to her by her mother, as her separate property, which complainants prayed might be sold for the payment of said note: *Held*, that the note was not a charge on the separate property of the wife, and her slaves could not therefore be sold for the payment thereof.

APPEAL from the district chancery court; Hon. Henry Dickinson, vice-chancellor.

The bill states, that in 1843, Jane Doyle purchased from Peter Gee & Co. a large amount of merchandise, comprising articles necessary for a plantation and household purposes. That on February 3, 1844, she, with W. G. Doyle, executed a note for \$314 11, payable one day after date, to said Gee & Co. in payment for said articles. That the wife of W. G. Doyle was possessed of a large separate estate, consisting in part of negroes, John Young, his wife Cicily and their child Anderson, Freeman, his

wife Grace and their children Henry and Catherine, Little Fed and Rhoda; which negroes she holds to her separate use, by deed of gift from her mother Jane Estill, without trustees, and that she is conducting a plantation. That the note was given to charge her separate estate, on the faith of which the goods were sold. That in September, 1844, the note was assigned, without recourse, to complainants. The bill prays that W. G. Doyle, as trustee, by operation of law, for his wife, be decreed to pay the note out of her estate; and on failure, that so much of said estate be sold as will satisfy the debt, and for general relief.

The defendants filed a general demurrer, for want of equity in the bill, which was overruled. An answer was then filed, admitting the execution of the note, but denying that Mrs. Doyle purchased the goods, &c., or that she in any way induced Gee & Co. to sell the same on the faith of her separate property. W. G. Doyle says he purchased on his own responsibility, and that his wife was in no way a party to the contract. Some time after the purchase, Gee & Co. sent their clerk to the house of the defendants, to make a settlement. W. G. Doyle was found to be indebted to the amount of the note, and the clerk insisted that Mrs. Doyle should join her husband in making the note. At the earnest solicitation of said clerk she reluctantly signed it, without any previous obligation to do so. She never made any contract with Gee & Co. with a view to bind her separate property. The deed of gift from the mother of Mrs. Doyle, to the slaves, is filed as an exhibit to the answer of the defendants; they deny that Mrs. Doyle has any other title to the slaves than is conferred by that deed, and they aver that they are informed that she has no such separate property in them under said deed as complainants suppose, and that she could not encumber her title except by joint deed with her husband, made pursuant to the provisions of the act of 1839, commonly known as "the woman's law." No evidence was offered on either side, and the cause was set for hearing on the bill, answer, and exhibits. At the June term, 1845, a decree was rendered dismissing the bill, at the costs of com-

plainants. From that decree the complainants prayed an appeal to this court.

L. Lea, for complainants.

The important fact in this case is, that Jane Doyle signed the note. And the obvious inquiry is, for what purpose did she sign it? It must be presumed that she had some object in view; and it is evident that object was to give a security in some way for the payment of a debt. This could only be done by binding something. She could not bind her person; and the conclusion must be, that she intended to bind her property. Otherwise, the act of signing the note was nugatory, and the note itself, as to her, can have no validity or operation whatever. I admit that Jane Doyle must, in order to charge her separate property, have so intended. But I contend that the making of the note is *prima facie* evidence of such intention; and it is incumbent on her to prove the contrary. Her mere denial is not sufficient. It is well remarked by Judge Story, that "the natural implication is, that if a married woman contracts a debt, she means to pay it; and if she means to pay it, and she has a separate estate, that seems to be the natural fund which both parties contemplated as furnishing the means of payment." 2 Story's Eq. 628. There is no evidence that Jane Doyle signed the note as surety for her husband. It is a joint note, and signed first by her. She is *prima facie* primarily liable; and there is no necessity for proceeding, in the first instance, against Doyle, or for showing that he is insolvent.

J. S. Johnson, for appellees.

The separate property of the wife has never been held liable to the payment of a promissory note executed by her, except upon the ground that she could not bind herself personally by such an instrument, and must, therefore, have intended that it should bind her property. This presumption of law is expressly negatived by the pleadings in this case. It is therefore contended that, even if Jane Doyle had a separate personal estate, it could not be subjected to the payment of this note.

2. It appears, from the pleadings in the cause, that the property of the wife, specified in the bill, is held under the provisions of the statute of 1839 known as "the woman's law." It is clear that the statute of 1839, was not intended merely to protect the wife against any improper act of her husband in disposing of her property, but also to guard her against the consequences of her own acts. It has been long settled that a *feme covert* cannot convey or incumber her separate freehold interest in real estate, so as to defeat the heir at law. Clancy on Rights, 282, 291. The statute of 1839 throws the same safeguards around the property of a *feme covert*, in slaves, by requiring the same formalities in the disposition of the *feme covert's* estate in slaves. How. & Hutch. 332. In the case of *Jaques v. The Trustees of the Methodist Episcopal Church*, it is decided that the wife, by antenuptial contract, can limit her power of disposition over her estate. 17 Johns. R. 584, 585. If, by the antenuptial contract of the parties, the wife's power of disposition over her separate estate can be limited to a particular mode, it seems very clear that such limitation can be made by statute. It seems exceedingly clear that the note cannot be a lien on the slaves specified in the bill, because neither of the makers of the note could, by express deed, or in any other way than that prescribed by statute, create such lien. If Jane Doyle could not, by express deed, create a lien on the slaves specified in the bill, the proposition, that she could do so, by so slight an act as the mere signing a note, under any undue influence, that might control her at the time, without the formalities required by the statute, to complete a conveyance of such slaves, seems too absurd to require serious consideration. It cannot be pretended that complainants were defrauded, for they were not misled to their injury. Jane Doyle's signature to the note could in no possible manner injure Gee & Co.

3. Complainants do not charge that W. G. Doyle is insolvent, nor do they show any other excuse whatever for coming into this court, except the pretended liability of Jane Doyle. It is clear, therefore, that their remedy is at law, and against W. G. Doyle, alone.

4. But, suppose the foregoing positions to be all wrong, it is still clear that the court could not decree a sale of the slaves in question, to satisfy the note executed by Doyle and wife. It appears, from the pleadings in the cause, that Jane Doyle executed the note merely as a surety. Now, suppose that she could bind either herself, personally, or create a lien on her property, in this way, it would follow, under the statute of our state, (How. & Hutch. 596, 597,) that the property of G. W. Doyle, the principal, must first be exhausted, before recourse could be had against that of the surety. If a judgment at law had been obtained against these defendants, each being fully competent to make such contract, the vice-chancery court would enjoin a levy on the property of Jane Doyle so long as W. G. Doyle had any effects subject to the satisfaction of such judgment. It seems exceedingly plain, then, that the chancery court ought not to do, by its own decree, what it would enjoin, and restrain a court of law from doing. See How. & Hutch. 596, 597.

William and William G. Thompson, on the same side.

There is but a single question in this cause. Can a married woman, holding property under the statute of 1839, bind it as fully and in the same modes as she could bind her separate property, held independently of the statute, under the rules of the common law? The rules of the common law will ~~not~~ govern, unless the estate of the woman in property under the statute be similar to the estate held by her at common law, and to which such rules have been applied. Now, to what character of estate in the married woman have the rules of the common law on this subject been applied? Could she bind, by her contracts, any property, except such as she held to her sole and separate use? Under the common law she could not hold personal property, except to her sole and separate use. Whatever interest or estate in personal property she might take, be it a life estate, or whatever else, it would vest immediately, and absolutely, in her husband, if she took it not to her sole and separate use. But, under the statute, she does not hold her

personal property to her sole and separate use. It is wholly a different estate from that which, under the common law, she could bind by her contracts. How, then, can the rules of the common law on the subject be applied to this case? There may be some difficulty in determining the exact nature of the estate held by a married woman, in personal property, under the statute. It cannot, however, be considered, in any view, greater than the estate a married woman holds in land owned by her before the marriage. Under the common law she could not, by contract, bind such estate in land. How, then, can she bind her estate in personal property, held under the statute?

This case turns upon the question, whether the wife can, by her separate contract, bind the property held under the statute. The bill proceeds entirely upon her contract. The husband is not liable in proceeding in equity, on account of his signing the note. His liability is only legal; and he can only be proceeded against in law. The case then stands precisely as though the wife alone had given the note.

The law can sell property, only where the party holding the property can sell. This proceeding is, substantially, against the wife alone. The husband is only a nominal party. He is not, on his own account, liable in equity. The object of the bill, then, is to procure, through the law, a sale of the property against the wife. But if she cannot sell it the law cannot sell it for her. According to the statute the property cannot be sold, except by the joint deed of the husband and wife.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The appellants filed their bill in the district chancery court against the appellees, to obtain payment of the amount of a promissory note out of the separate property of Mrs. Doyle, the note having been given by the wife, jointly with her husband. The bill alleges that Jane Doyle purchased, of Gee & Co. the assignors of the note, a quantity of merchandise, consisting of articles necessary for the use of the plantation, and for house-keeping purposes, and that, on a settlement of the account, she

executed the note. That she has a considerable separate property, consisting of slaves, which she acquired by deed of gift from her mother.

The respondents first demurred, but the demurrer was overruled, whereupon they answered. The answer denies, in the most positive manner, that the said Jane purchased the goods, or made any contract whatever, and avers that they were purchased by the husband alone, on his individual responsibility, and also that the wife never intended or promised, either before or since the purchase, that her separate property should stand charged with the payment. The answer further states that the note was given under the following circumstances: the clerk of Gee & Co. brought the account to the house of respondents for settlement, and requested that the wife should join her husband in a note for the amount due. This she at first refused to do, but ultimately reluctantly consented, not for the purpose, or with the intention, of charging her separate property. They admit that the wife has the slaves mentioned in the bill, which she acquired by deed of gift from her mother. The deed is made an exhibit, and bears date the 24th of March, 1841.

No proof was taken on either side, and on the hearing the vice-chancellor dismissed the bill. If the note constituted a valid charge on the property of the wife, and the case was sufficiently made out, the bill was improperly dismissed.

The deed of gift bears date subsequent to the act of the legislature, entitled "an act for the protection and preservation of the rights and property of married women," and on its face makes reference to the act. The provisions of that law must be regarded as controlling the question before us. From its title it would seem that something more was intended than to secure merely a separate ownership, and its provisions seem to have been framed with the view of restraining the wife from conveying, or disposing of her personal property in the usual modes of transfer. It secures the property owned before coverture, or acquired afterwards by conveyance, gift, inheritance, distribution, or otherwise, to the separate use of the wife, subject to the control of the husband, who is also entitled to the profits. The

last section declares that slaves owned by a *feme covert*, under the provisions of the act, may be sold by the joint deed of the husband and wife, executed, proved, and recorded agreeably to the laws then in force, in regard to the conveyance of the real estate of *feme coverts*, "and not otherwise." The mode of transfer is not only pointed out by reference to another law, but there is a prohibition as to any other mode of conveyance. In designating the mode of conveyance, and in limiting the capacity to convey to the prescribed mode, the legislature seem to have had it in view to protect the wife against the undue influence of the husband and others. The general rule at common law is, that a *feme covert*, having a separate estate, acts with regard to it as a *feme sole*; a rule which this statute must have been designed to limit, by requiring that the husband should join in the conveyance, and that it should be made under certain prescribed ceremonials. If she cannot convey the absolute title, except in the prescribed mode, it seems to follow, that, in accordance with the spirit of the act, she cannot incumber the property by charges, in any other way than that pointed out. The object of the act would be defeated in many instances, by holding that her contracts by bonds or notes amounted to a charge. But even if we were disposed to follow the English decisions on this subject, to their utmost extent, it is not clear that this particular contract amounted to a charge. The case of *Hulme v. Tennant*, 1 Br. C. C. 16, in which the separate property of a *feme covert* was held liable for the payment of a bond executed by the husband and wife, gave great dissatisfaction, and was supposed by Lord Eldon to have gone too far. The greater part of the money, in that case, was received by the wife. *Bulpin v. Clark*, 17 Vesey, 365, is the only other case that bears a close resemblance to the present, it being a case in which the separate property of a *feme covert* was held liable for the amount of a promissory note made by husband and wife; the note, however, was made on the contract of the wife alone. In this case the allegation that the note was given on the contract of Mrs. Doyle, is flatly denied by the answer, in which it is averred that she reluctantly con-

76 HIGH COURT OF ERRORS AND APPEALS.

Frost & Co. v. Doyle and Wife.

sented to sign it, and there is no proof on the subject. But we deem the statute as conclusive on this subject, if not by its letter, at least in spirit. The decree of the vice-chancellor must be affirmed.

YOUNG BERRY vs. EMELINE BLAND.

Under the act of 1839, with reference to married women, it being provided that the slaves owned by a *feme covert*, under the provisions of that act, "might be sold by the joint deed of the husband and wife, executed, proved and recorded, agreeably to the laws now in force in regard to the conveyance of the real estate of *feme coverts*, and not otherwise;" it was held that a married woman could not charge her separate personal estate owned under the provisions of that statute, with any debt or liability, in any other mode than that pointed out in the statute; where therefore a married woman owning slaves, under that act, executed a forthcoming bond jointly with her husband as sureties for a third party, which was forfeited, her slaves are not liable to be sold under execution on such bond; and a court of chancery will enjoin their sale.

It seems by the common law to be now settled that a *feme covert*, is not liable personally for any debt, nor is her separate property in general liable in equity for the payment of her general debts, or her general personal engagements; yet the fact that the debt has been contracted during coverture, either as a principal or as a surety for her husband, or jointly with him, seems ordinarily to be held *prima facie* evidence to charge her separate estate without any proof of a positive agreement, or intention to do so.

APPEAL from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

Mrs. Emeline Bland, who alleges herself to be the wife of Maxwell W. Bland, filed her bill by her next friend in the superior court of chancery, against Young Berry, the appellant.

She alleges that at the May term, 1840, of the Claiborne circuit court, Berry recovered judgment against P. Hooper and S. Douglass, the executors, and herself as executrix of James S. Douglass, upon a note executed by him in his lifetime. That an execution was issued upon this judgment, and returned *nulla bona*. That subsequently a pluries writ of execution was issued, upon which Stephen Douglass, one of the executors, gave a forthcoming bond, with the appellee, and her husband

Berry v. Bland.

as his sureties, which bond was forfeited. That at the time of the rendition of the original judgment against her as executrix, she had ceased to be one, having, prior to its rendition and prior to her intermarriage with Bland, resigned her letters testamentary. That in February, 1841, she was married to her present husband, and that in November, 1841, when she signed said forthcoming bond, she was a *feme covert*. That an execution had issued upon said forfeited bond, and had been levied upon certain slaves which were her sole and separate property. She prayed for an injunction, which was granted.

The appellant filed a general demurrer to the bill, which was overruled by the chancellor, from which decision, he has taken an appeal.

R. S. Holt, for appellant.

The sole ground of relief relied on by complainant, is the invalidity of her bond, arising from her coverture existing at the time of its execution.

If the bond was invalid, it was so by the principles of the common law, and the right to have it annulled is one which would be recognized and enforced in a common law forum.

The practice of vacating such bonds for defects either latent or patent, either by motion or by writ of error in the circuit court into which they are returnable, is too familiar to need an argument in proof of its existence.

In this practice complainant had at law a plain, adequate, and complete remedy by which to accomplish all that she seeks to accomplish by a resort to a chancery court.

If the remedy of complainant at law was thus plain, adequate and complete, she has upon familiar principles no right to the aid of equity. True, the return term of the bond had long passed before the exhibition of this bill. But if the legal remedy of complainant was by that means impaired, it was the result of her own laches against which a court of equity could not relieve her.

But though this bond should be invalid in law, it is unquestionably a charge upon the separate property of com-

plainant in equity. 2 Story's Eq. 628; 1 Bro. Cha. 16; 15 Ves. 596; 17 Ibid. 365; 2 P. Wms. 144; 3 Mad. Rep. 387; 1 Tuck. Com. 111, 112. If it operate as a charge upon the separate estate of complainant, a court of chancery would, upon a proper application, subject such property to sale for the satisfaction of the debt. Complainant then called upon the chancery court to relieve her against a demand when enforced by legal process, which the same court would have been bound to enforce by its own appropriate organs.

Such an appeal to the chancery court was litigious, vexatious and unjust. As complainant sought equity, she should first have done equity, by satisfying the debt with which, by solemn contract, she had charged her estate. 1 Story's Eq. 77.

But it is insisted that the bond of complainant was valid even at law. By the strict rules of the common law, a *feme covert* could not bind herself by contract, for two prominent reasons. First, because if she could have contracted, she might have been taken in execution, and her husband deprived of society, which the law would not allow. Secondly, the law having deprived her of the power of holding property in her own name and right, it was held that in depriving her of the means of making good her engagements, it was intended she should make none. Neither of these measures exist in this state. A *feme covert* cannot be taken in execution here, and she can hold property in her own name and right. The reasons of the disability not existing, the disability itself does not exist; and married women are with us restored to their primitive right of contracting; a natural right which, in the absence of any social restriction, belongs to every sane human being who has attained to years of discretion. This is the view taken of the subject by courts of chancery long since, when they held that a *feme covert* should not be taken in execution, and that she might hold separate property; they proceeded a step further, as consistency required, and held her capable of contracting. True, it was in the language of the books called a charge upon her separate property; but in fact it was a contract by which she pledged her *property* for the fulfilment of

Berry v. Bland.

her engagements, instead of her *property and her liberty*, as did the ordinary debtor at common law.

It is therefore believed that the chancellor erred in overruling the demurrer.

John. B. Coleman, for appellee.

Mrs. Bland being a *feme covert* when she signed it, the bond as to her at least, is an entire nullity.

A married woman is incapable of binding herself at law by any contract. Should she attempt to do so, as by executing a bond, note or other obligation, she can neither be sued nor can a judgment at law be rendered against her upon it. 2 Kent 168; Reeves's Dom. Rel. 65; Clancy on Rights, 23. At the time Mrs. Bland signed the forthcoming bond in this case, she was a *feme covert*. She signed it as surety of Stephen Douglass. The effect of such signature under our statute is, that if upon the day fixed for the delivery of the property to the sheriff, it is not surrendered, the bond is forfeited, and at the very instant of its forfeiture, rises by operation of law into all the force, and has all the effect of a judgment against the parties to it. It is purely and wholly a judgment at law, and the statutory judgment rendered upon it is a judgment at law. To hold, then, that a married woman has power to execute such a bond, and to bind either her person or her property by it, must be to present the anomaly of a court of law, in violation of every principle by which it is governed, entertaining jurisdiction over a contract made by a *feme covert*, and rendering a judgment upon it against her, sustaining the validity of an instrument which, by the rules of law, is absolutely void, and investing it with the highest solemnity (that of a judgment) which it has power to confer.

It is contended, however, that though a married woman cannot bind herself at law by her contract, bond, &c., and though an action at law cannot be maintained against her upon it, yet if she have separate property, a court of equity will enforce it by subjecting that property to its performance or payment.

There is a wide dissimilarity between *forthcoming* and *ordi-*

nary bonds or obligations. A forthcoming bond is the creature of the statute — it is *sui generis* — its object, effect and operation are prescribed by the statute, and within these it is strictly circumscribed. In form it may be considered a bond, but in substance and effect it amounts to a power to confess judgment upon the non performance of its stipulations or conditions. It is conditioned for the delivery of property upon a particular day. The moment that condition is broken, its character is changed, and without any intervening steps, it ascends at once to the dignity of a judgment. No suit upon it at law is necessary, nor could one be sustained. Neither, we apprehend, could a court of equity entertain a bill to enforce the performance of it as a bond. Before a breach of its condition, such a bill could not be maintained, because the obligors are not then in default, and after the condition is broken, it loses its character of a bond, and is merged in the judgment rendered upon it. As a bond, then, a court of equity can have no power to enforce its performance by subjecting the separate estate of the wife, because its interposition can never be invoked upon it in its character of a bond. The question is therefore presented whether a court of chancery can or will lend its aid to a court of law to enforce a void judgment, or whether it will even suffer a court of law to enforce it itself. The judgment is a nullity so far as regards Mrs. Bland, and it must be a perversion of equity to attempt to infuse life into it for the purpose of subjecting her estate to its payment. We take it to be clear that a *feme covert* cannot be sued at law upon a bond executed by her during coverture, and that a judgment rendered against her by a court of law upon such bond would be void, and we conceive it to be wholly immaterial whether that judgment be the result of a suit regularly instituted and carried on through the court with all the necessary formalities of pleading, or whether, as in the present case, it is raised by the statutory effect given to the forfeiture of the condition of the instrument.

The property levied upon in this case consisted wholly of slaves, the separate property of Mrs. Bland. By our statute, a married woman who is the owner of slaves, can only dis-

pose of them by the joint deed of herself and husband, "executed, proved, and recorded agreeably to the laws now in force in relation to the conveyance of the real estate of *femes covert*, and not otherwise." H. & H. 332, sect. 26. A private examination of the wife, previous to any conveyance of her slaves, is thus rendered necessary, and in the absence of such examination her conveyance would unquestionably not be binding upon her. Now, if she cannot make a direct sale or conveyance of her slaves without going through all the formalities required upon a conveyance of her lands, and if a sale or conveyance, made without these formalities would be of no binding obligation upon her, it would work a most palpable violation of the spirit and equity, if not of the letter of the law, to hold her bound by her simple signature of an instrument, the effect of which is to divest her, without a compliance with one single requisite of the statute, of every particle of the property which the law has thus endeavored to secure to her. The law is favorable to the rights of married women, and the restrictions which it imposes upon her power of disposition, are intended to guard and secure her estate from being squandered and dissipated. They are barriers intended for her protection, and if broken down, will place it in the power of the husband or of others, indirectly and covertly, to gain possession and control of property which they are unable to acquire openly or directly.

It is further contended, on the part of the appellant, that even if the statutory judgment rendered against Mrs. Bland is void as to her, still, inasmuch as she had an adequate remedy at law, and failed to avail herself of it, she is precluded from obtaining relief in equity.

This position has been overruled by this court. In *Sessions v. Jones*, 6 How. 125, it was held that the fact that the obligor in a forthcoming bond had an adequate remedy at law, did not exclude the jurisdiction of the chancery court.

It is also objected that Mrs. Bland, by her laches in not moving to have the forthcoming bond quashed at the return term, is barred of all remedy against it.

While the disqualification of coverture exists, laches can

hardly be imputed; and Mrs. Bland, from her signature of the bond down to the present time, has been and is a *feme covert*. Even had she been a *feme sole* at the date of the forfeiture of the bond her failing to enter a motion to quash it at the return term, must by no means affect her rights in the present case. The bond as to her was void, and comes within the decision made by this court in the case of *Nelson, Carlton & Co. v. R. H. Os-good & Co.* 6 Howard.

Mr. Justice CLAYTON delivered the opinion of the court.

This is an appeal from the superior court of chancery. The appellee, the complainant in the court below, executed a forthcoming bond jointly with her husband as sureties of Stephen Douglass. Execution issued, which was levied upon slaves, the separate property of the complainant. This bill is filed to enjoin the sale; it was demurred to by the defendant, the demurrer overruled, and the case brought by appeal to this court.

The English decisions in regard to the separate property of a married woman, and her power over it, are so far from being consistent and uniform, that Lord Eldon said, upon all the cases taken together, it was impossible to know what the law was. It seems, however, to be now settled, that a *feme covert* is not liable personally for any debt: nor is her separate property in general liable in equity for the payment of her general debts, or her general personal engagements. Yet the fact that the debt has been contracted during the coverture, either as a principal or as a surety for her husband, or jointly with him, seems ordinarily to be held *prima facie* evidence to charge her separate estate, without any proof of a positive agreement or intention to do so. 1 Brown Ch. R. 18 n.; *Chassaing v. Parsonage*, 5 Ves. 17; *Gardner v. Gardner*, 22 Wen. 526; 2 Story Eq. sect. 1400.

In this condition of the English law the statute was passed in this state, upon which we are called to place a construction. The intention of the legislature is too plain to be mistaken. The statute directs a particular mode in which a *feme covert*

may alienate her separate property, and provides that it shall not be done *otherwise*. To hold that it cannot be alienated directly in any other mode, yet that it may be charged with debts, contracted during coverture, subjected to execution and sold indirectly, would be to let in all the mischiefs, against which the statute seems directed. The object in view appears to have been to guard her against her own acts, into which her affection for her husband, or his influence over her might lead her. Our duty is to follow the plain provisions of the statute, and not to defeat its end, by the interpolation of equitable exceptions. When the community know that married women with a separate estate have no power to charge it or bind it, except in the manner pointed out by the statute, contracts will be framed to meet that state of the law. There is no more reason to decide that her personal estate can be subjected to the payment of debts under this act, than that her real estate may be, under the previous law. Both are now upon the same footing. See *Frost v. Doyle, and wife*, ante. This is in our opinion the true exposition of the statute, and our decision rests upon that alone.

As this disposes of the case, no other question need be noticed.

The decree is affirmed.

THOMAS O. ENOS vs. THOMAS SMITH and RICHARD BIGELOW.

A judgment without notice and without the appearance of the party against whom it is rendered, is a nullity, and may be shown to be so even when it comes collaterally in question.

Where the grantor in a deed is sued for a breach of his covenant of warranty, and the alleged breach consists of the recovery of dower in the land conveyed by an order of the probate court, it is clearly competent for the grantor to show that the land embraced in his deed was not subject to the dower allotted out of it, and to preclude him from such defence is error.

ERROR, from the circuit court of Adams county; Hon. Charles C. Cage, judge.

This was an action of covenant brought by Thomas Smith and Richard Bigelow, partners under the name and style of Thomas Smith & Co., against Thomas O. Enos, to the May term, 1840, of the circuit court of Adams county. The declaration avers that Enos, by deed executed on the 17th day of May, 1832, conveyed to Thomas Smith & Co. "all those two certain lots and houses, and lots of ground in the city of Natchez, on South Cross street, between First and Second streets, fronting eighty feet on South Cross street, and on the east side thereof, and running back one hundred and sixty feet, and all improvements thereon, being the same property conveyed by the sheriff of Adams county to James C. Wilkins on the day of March 1832, and by the said Wilkins to said Enos on the same day," and covenanted to warrant and defend the same and every part and parcel thereof against the claims of all persons claiming the same either in law or equity. The breach assigned in the declaration was, that at the time of the sealing and delivery of the deed, and long before, a certain Anna McComas owned and possessed a dower interest in all the above described premises; that on the 13th day of April 1833, she filed

her petition in the probate court of Adams county, praying for an allotment of dower in said houses and lots, to which petition the said Thomas Smith & Co. were made parties defendants; that at the June term of the said probate court in the year 1833, an order was made directing the sheriff to lay off and allot to said Anna her dower; that one third part of the said premises was accordingly allotted to her, and the plaintiffs totally removed and expelled therefrom, and the said Anna and her grantees had remained in possession of the same ever since. Wherefore the plaintiffs aver the said Enos hath failed to keep and perform his covenants contained in said deed, &c. To this declaration the defendant filed four pleas; first, that he did not covenant to warrant the said described premises and every part thereof; second, that he did not convey to the said plaintiffs the said property described in their declaration; third, that the plaintiffs were not ousted by said Anna, in pursuance of an order of said probate court upon her said petition; and fourth, that he did not convey said premises and warrant the same as stated in said declaration. To the first, second and fourth pleas the plaintiffs demurred, because they each amounted to a plea of *non est factum*, and neither was sworn to. The court sustained the demurrer, and gave the defendant leave to answer over. The record does not show what disposition was made of the third plea, it does not appear to have been demurred to nor issue taken on it. By leave of the court, the defendant after the demurrer to his first, second and fourth pleas had been sustained, filed three additional pleas; first, that the plaintiffs had notice, at the date of their deed from the defendant, of said Anna McComas's claim to dower, and that the same was not covered or included in said covenant; second, that the plaintiffs were not ousted by a paramount title; and third, that Anna McComas did not recover possession of any part of said premises by the judgment of any court of competent jurisdiction; and her possession was therefore tortious, and not a breach of the covenant in the declaration mentioned. The plaintiffs demurred to the first of the last named pleas, because it contained no answer to the declaration, was argumentative and

double, and not entitled of any term, and took issue on the second and third. The demurrer to the first plea was sustained by the court, and a judgment of *respondeat ouster* awarded, but the defendant refused to answer over again. On the trial the plaintiffs read to the jury a transcript of the record of the probate court of Adams county, on the petition of Anna McComas for an allotment of dower in the above described premises; which shows that she filed her petition in the probate court at the May term, 1838, averring that she was the widow and relict of Josias H. McComas, who died seized and possessed of the above-mentioned houses and lots; that she had never relinquished her dower in the same, and praying to have her dower allotted to her, &c.; that upon the petition of Thomas Smith & Co. they were made defendants to, and permitted to answer the petition of Anna McComas; their answer denies that she is entitled to dower in the said premises, and avers that on the 28th day of February, 1830, the said Josias H. McComas and Anna McComas, by deed duly executed, conveyed said houses and lots to Thomas O. Enos, and said Anna thereby relinquished all her right to dower therein; and that the probate court rendered a decree in favor of said Anna, and ordered her dower to be allotted and laid off to her. The record further shows that Thomas Smith & Co. filed a bill of exceptions to said decree and order of the probate court, on the ground that the said Anna had not given sufficient notice of her said application for dower, the only notice given being by publication in a newspaper; that an appeal was prayed and granted from said decree to this court, and afterwards by this court, upon motion dismissed. This record was the only evidence adduced by the plaintiffs. The defendant's counsel then offered to prove that the said decree of the probate court was irregular and void, because the notice required by the statute to be given upon applications for dower was not properly given, and was not presented to the probate court so proved and authenticated as to authorize said decree; but the court would not permit the proof to be made, and decided "that the defendant could not introduce any evidence to show that the said decree of the probate court was irregularly

made, but that the same was final and conclusive, and binding on the rights of the defendant Enos." To the ruling out of which evidence, and to the opinion of the court deciding that no evidence could be admitted to question the regularity of said decree assigning dower, the defendant excepted. The jury returned a verdict in favor of the plaintiffs for one thousand three hundred and thirty-seven dollars and seventy-seven cents damages, and judgment was entered accordingly, to reverse which the defendant brought the case to this court by writ of error.

Van Winkle and Potter, for plaintiff in error.

The ruling of the court that the probate record was "final and conclusive and binding on the rights of the defendant Enos," and that he could not even show its invalidity, was clearly erroneous; plaintiffs were bound to prove an eviction by title paramount, and the record was no evidence to show that fact. *Noke's case*, 4 Co. Rep. 80; *Kirby v. Hansaker*, Cro. Jac. 315. Enos had no notice of the proceedings for dower, wherefore the record was not proof as against him, to show an eviction, and charge him upon his covenant. *Hamilton v. Cutts*, 4 Mass. 353; *Williams v. Wetherbee*, 4 Aik. 329.

The petition for dower, set forth in this record, does not show that dower was claimed of the same lots conveyed by Enos, and therefore the record was not "conclusive" to show a decree for dower out of those lots. The probate record shows a mere decree for dower, but no part allotted and set off for dower, no possession delivered to the dowress; it was therefore no proof of eviction.

The third plea, first pleaded, denies an eviction under any order on said petition for dower; the second plea on *respondet ouster*, denies that plaintiffs were ousted by title paramount; the last plea pleaded that they were not ousted by judgment of any court of competent jurisdiction. These were the issues to the jury, and the probate record must have been offered to prove one or more of them; that is, to prove an eviction under the decree for the allotment of dower or an eviction by title para-

mount. Instead of being conclusive on the rights of Enos, as the court charged, the probate record was not evidence to prove, and did not tend to prove, any one issue in the cause.

R. W. Gaines, for defendants in error.

The only question is as to the ruling of the court below, that the decree of the probate court was conclusive. I am aware that some of the recent decisions of this court (not reported,) have a strong bearing against this opinion of the court below, but it appears to me somewhat difficult to reconcile these cases with others reported in Howard and 1 S. & M. In 5 How. 736, this court decided that the decrees of the probate court on matters confided to its jurisdiction, are *conclusive*, and cannot be set aside except for fraud. That they are obligatory in every other court until reversed, see also, 1 How. 450; and 1 S. & M. 527. Here the jurisdiction of the court was unquestionable, and the notice required by the statute, H. & H. 352, was given. I refer also to 3 How. 205.

There is no exception to the opinion of the court as to the conclusiveness of the decree. The court will find this to be the fact in examining the bill of exceptions. The only exception is "to the opinion of the court deciding that no evidence could be admitted to question the irregularity of said decree assigning dower." This could not be done according to the decisions to which reference has been made. The case referred to in 4 Mass. 350, only decides that an eviction may be proved by parol. It does not decide that the judgment of a court of competent jurisdiction, may not be evidence of the same thing, and I imagine there is no authority for the position that such a judgment can be impeached by parol testimony except for fraud.

The bill of exceptions does not embody the testimony in the cause. For aught that appears there was ample evidence before the jury to prove the seizin of McComas, the husband of the widow, and every other fact necessary to sustain the judgment.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of covenant brought by the defendants in

error, against the plaintiff in error, for breach of warranty in regard to certain real estate. The alleged breach consisted of the recovery of dower in the premises by an order of the probate court of Adams county. Upon the trial the plaintiff in error offered to prove that the order of the probate court allotting the dower, was irregular and void, because of the want of notice of the application. The court below decided that the defendant could introduce no testimony to show that the decree of the probate court was irregularly made, but that the same was final and binding and conclusive upon his rights."

A judgment without notice, and without appearance of the party is a nullity. It may be shown to be so, even when it comes collaterally in question. In this case, however, it appears affirmatively by the record, that notice by publication had been given. Objection to the sufficiency of this notice was made in the probate court, and the objection there overruled. An appeal was taken from that decision to this court, and the appeal was dismissed. The point in the case was therefore settled, so far as the parties to that proceeding were concerned. But according to the repeated adjudications of this court, the circuit judge went too far, when he held the decree of the probate court to be final and conclusive upon the rights of Enos. *Farmers and Merchants Bank of Memphis v. Tappan and wife*, 5 S. & M. 112; *Holloman v. Holloman*, Ib. 559; and *James and wife v. Rowan and wife*, 6 Ib. 393. It was clearly admissible for him to show that the land out of which the controversy grew, was not subject to the dower of Mrs. McComas, and it was error to preclude him from such defence. Although this was an incidental decision of the circuit judge, yet it was made the ground of exception, and had the effect to exclude all testimony as to the liability of the land to the dower right of Mrs. McComas.

For this error the judgment will be reversed and the cause remanded for another trial.

SOLOMON TIFFT AND WILLIAM CLARK vs. ALEXANDER VIRDEN.

The proceeding by motion for an award of execution on a replevin bond after a distress for rent, is a summary remedy, and must therefore conform to the statute in all material respects.

The bond is the foundation of the jurisdiction of the court; therefore it must appear upon the record that the bond had been lodged in the office of the clerk of the court, or the court has no power to award an execution.

If the record shows that the bond was lost before it was ever lodged in the proper office, the court cannot take jurisdiction of the case.

ERROR from the circuit court of Hinds county; Hon. John H. Rollins, judge.

It appears from the record, that on the 17th day of June, 1844, Alexander Virden gave notice to Solomon Tift and William Clark, that he would, on the 29th day of June, 1844, move for judgment against them in the circuit court of Hinds county, on a bond made by them and payable to him in the penalty of two hundred and seventy-five dollars, dated the 30th day of December, 1843, conditioned to pay him at the end of three months from the date thereof, one hundred and twelve dollars and fifty cents, rent in arrear and unpaid. The notice stated that the bond had been lost, and an affidavit of that fact had been filed in said court. The affidavit states the proceeding by distress for rent due by Tift to Virden, the execution of the bond by Tift and Clark, the return of the bond to the office of the justice who issued the distress warrant, and the subsequent loss of the bond, warrant, and all the other papers in the case. When the motion was called for hearing, Tift and Clark insisted on their being permitted to contest the law and facts arising in the cause without pleading in writing; the court refused to permit them to do so, and they filed a bill of exceptions. They then demurred, and assigned as causes of demurrer, —

Tift et al. v. Virden.

"1. That there is no sufficient showing that the bond is lost, and could not be produced. 2. This motion cannot be maintained on a lost bond; the lodging of the bond is indispensable to give the court jurisdiction to proceed by motion under the statute." The court overruled the demurrer, and a jury was empanelled and sworn to "inquire whether said defendants made and delivered the bond in the plaintiffs' motion mentioned, and whether, if the same was made, it has at any time since the delivery thereof been paid or otherwise discharged," — who found that "the defendants did make and deliver the bond in the plaintiffs' motion mentioned, and that since the making and delivery thereof it has not been paid nor discharged." The court thereupon rendered judgment in favor of Virden, for one hundred and twelve dollars and fifty cents debt, and three dollars and fifty-four cents damages. To reverse which judgment the defendants have brought the case to this court by writ of error.

D. Mayes, for plaintiffs in error.

The 1st section of the act for the better securing the payment of rent, (Revised Code, 168,) provides that the distress-warrant shall issue by a justice of the peace "of the county where the lands and tenements leased are situated."

The 2d section directs the manner in which goods distrained may be replevied.

The 3d section provides, that "if the money shall not be paid, according to the condition of such bond, it shall be lawful, and full power and authority are hereby given to the court having jurisdiction of the amount of such bond, where the same shall be lodged upon motion of the party to whom the same is payable, to award execution thereupon with costs;" provides for ten days' notice, that the officer shall take no surety, and that execution be so indorsed.

The notice and the bond on which motion was made, properly constitute part of the record without bill of exceptions. *Tooley et al. v. Culbertson*, 5 How. 272. The notice states that the bond was lost, and therefore was a notice for a motion on a

Tift et al. v. Virden.

lost bond, and not on bond filed. It informs the parties, that affidavit was filed of the loss of the bond. The affidavit therefore was, as appears from the notice, the foundation of the motion, and not a bond filed. The record is certified by the clerk to be "full, complete and perfect," yet there is no bond in it; therefore no bond was filed. The question then fairly arises, can the circuit court entertain this proceeding by motion, ascertain the bond by a jury, and enforce payment by a judgment, *quod recuperit*, when the statute under which the proceeding is had, provides that the bond be filed and that the court "may award execution thereon." The bond under the statute is in lieu of a judgment, and upon that the court may award execution as a court in a proceeding by *sci. fa.* awards execution upon a judgment when revivor is necessary.

"A proceeding by motion is summary, and in derogation of the common law, and can never be indulged unless it be authorized by the express letter or manifest intention of some statutory enactment." *Downing v. Dean's executors*, 3 J. J. Mar. 378; *Wood v. Sayre*, 7 Monroe, 663. Does the statute give, by manifest intention, a remedy on lost bond by motion, or authorize a judgment *quod recuperit*, or give authority of any kind save to award execution on a bond filed? It is a rule, "that upon a new statute, which prescribes a particular remedy, no remedy can be taken, but the particular remedy prescribed by the statute." 2 Burrow, 1157. Therefore if a statute gives a particular remedy under particular circumstances, it can only be adopted when the particular circumstances exist. It is contended by the counsel for Virden, that his affidavit constitutes no part of the record. I contend for the same.

The bond, to be valid as a statutory bond, so as to authorize this proceeding on it, should conform to the requisitions of the statute. This is conformable to principle, and embraced in *Cornell v. Rulan*, 3 How. R. 54.

The bond recited in the notice and motion does not conform to the statute.

1. It does not "mention that the same was entered into for

Tift et al. v. Virden.

goods or other estate distrained for rent, and restored to the debtor." Rev. Code, 169.

2. It does not appear that it was "given to the sheriff or officer serving such distress." *Ib.*

It may have been by the party himself that the bond was taken, and the statute only authorizes the award of execution on a bond given to the officer. It must be by reason of the official character of the person taking the bond, that it has the effect of a judgment.

The statute does not require pleadings in writing. The court would not permit objection in point of law to notice, &c. without demurrer.

The defendant's counsel contends in the court below, that we cannot object without demurrer, and that court sustains him. Here it is by him contended, that we cannot demur. We thought so then, and could only fail because the notice, &c. was considered part of the pleadings. If we were right then, the court erred in requiring us to demur. If we were wrong, then the court erred in overruling the demurrer, for the notice does not even charge the nonpayment of the money, or any essential fact in the case. The motion was no part of the pleadings, they were *ore tenus*, or in writing. If the former, not the subject of demurrer; if the latter, there was nothing in the nature of pleading but the notice, which was insufficient.

The jury were sworn "the truth to speak upon the issue joined," and there was no issue joined. This has been repeatedly decided by this court to be error.

The jury find, "that the defendants did make and deliver the bond in the plaintiff's motion mentioned." The bond in the motion mentioned does not conform to the statute.

D. Shelton, for defendant in error.

The only matters urged by the plaintiffs in error are the two questions raised by the demurrer. The demurrer is to the notice, affidavit, and motion. A demurrer cannot lie to the notice, because it is no part of the pleadings and because the demurrer is itself an appearance, and therefore is itself a waiver of notice.

It cannot lie to the *affidavit*, because that is no part of the pleadings nor of the record. The fact that it was lodged or filed with the papers in the cause, did not make it part of the record. If used at all in the cause it was part of the proof to the court, made necessary by law, before secondary evidence of the existence and loss of the bond described in the motion could be given. It was no more part of the record than the affidavit of a lost note would be in an action of assumpsit on the note. The demurrer, therefore, can apply only to the *motion*.

The causes of demurrer are, 1st. There is not sufficient showing that the bond is lost, and could not be produced. 2d. The motion cannot be maintained on a lost bond.

Now both these causes of demurrer to the motion are predicated upon the fact that the bond was lost and would not be lodged in the court. No such fact appears upon the motion; it is upon the bond itself, before its loss, if it was ever lost before the trial; and upon the hearing of the demurrer to the motion, the court could not anticipate what evidence could be introduced upon the trial of the cause.

But it may be urged, that the court below had no jurisdiction of the cause, and that therefore this court must reverse the judgment and dismiss the cause for want of jurisdiction in the court below.

There is nothing in the record to show that the judgment was not rendered upon the bond filed. The contrary appears in but two places in the transcript filed: in the demurrer of the defendants below, and in the affidavit aforesaid. But I have already shown, that the demurrer was bad, because the pleadings (or motion) did not show the fact relied on in the demurrer, to wit, the loss of the bond. Therefore the demurrer being bad for that reason, is no evidence to this court of the loss of the bond. I have also shown that the affidavit is no part of the record, and therefore this court cannot notice it.

The case, therefore, so far as it appears of record, is motion for judgment upon the bond, and a judgment for plaintiff on that motion. What secondary evidence was introduced for plaintiff on trial of that motion, this court cannot know. Tift

and Clark might have informed this court by their bill of exceptions embodying said evidence, but they did not, and this court must presume in favor of the correctness of the judgment below; that is, if to sustain the judgment it is necessary to presume that the bond was the evidence in the court below, this court must presume that the bond was introduced, there being nothing upon the record to show the contrary.

But if I were to admit that the proceeding was upon a bond that was lost, and that the demurrer could apply for that reason, still it could not be sustained.

The first ground of demurrer could not be sustained, because that objection is made upon the hypothesis, that the affidavit is Virden's only proof, preparatory to introducing secondary evidence of the contents of the lost instrument. Such was not the case and such is not the conclusion from the record. It is the reverse, for the presumptions are in favor of the correctness of the judgment below, and there being no bill of exceptions taken at the trial, there is nothing upon the record to show what evidence was introduced, on the trial, or whether that affidavit even constituted a part of it. The bond itself may have been found and read for aught that this court can know. The affidavit was filed several days before the trial.

The second ground of demurrer is improperly stated as a question of jurisdiction. It is in fact a question of practice; the only question is whether, after the loss, the landlord was compelled to sue in debt on the bond, or make his motion for judgment; in either case the circuit court had jurisdiction. It is like the question whether, upon a particular sealed instrument, covenant or debt should be brought. But on the question of practice the case must be reversed if a wrong remedy was selected, provided the other party can establish, by the record, that it was a wrong remedy; but to do that, unless it is shown by the pleadings (motion in this case,) he must by his bill of exceptions exhibit the evidence on the trial in the court below, which is not done in this case. This court must therefore presume that proper evidence to sustain the motion was introduced below. Moreover the loss of an instrument never changes the

remedy, except where it changes the jurisdiction from law into equity, as in cases of notes payable or indorsed to bearer, and negotiated before they become due, which change is made only because chancery alone can secure indemnity to the defendants; but where the jurisdiction remains in a court of law the remedy is not changed. The action, the proceedings, the judgment, is as much upon the instrument lost as if it were in court, the only change is as to the mode of proving the instrument sued on. The same facts are proved, but they are proved by secondary evidence, because it is out of the power of the party to produce the best evidence.

The argument predicated upon the language of the statute has but little force. The terms "where the same shall be lodged," are directory as to practice, and establish a very salutary one, but it does not destroy the remedy if it is impossible to file the bond, and a proper showing of that fact is made; had such been the object of the law, the language would have been that no motion should be maintained unless the bond be so lodged. As such directory clause it is a useful provision, because it requires the plaintiff to put upon the file evidence that will enable the defendant to plead that motion, in bar of a future suit upon the bond; that was the object of the clause. The same end is effected by the affidavit describing the bond, and thereby creating the same bar to a future suit. The section bears this construction upon its face. Such is its policy, and the statute being remedial, is entitled to a more liberal construction than that contended for by the plaintiffs in error.

Mr. Justice CLAYTON delivered the opinion of the court.

Judgment upon motion, for rent secured by replevin bond after distress. The notice states the bond to be lost; there is none in the record. There was a demurrer to the proceeding, in which the jurisdiction of the court is brought into question.

This is a proceeding under the statute, summary in its character. It must therefore conform to the statute in all material respects. The foundation of the jurisdiction of the court is the bond; without it no judgment could be given. If the bond had

been once *lodged* in the office, in the terms of the statute, and subsequently lost, that might possibly be sufficient. But that does not appear in this case.

Enough must appear upon the record, to show that the court had jurisdiction. The awarding of the execution is only authorized by the bond, it is the groundwork of the whole proceeding. It must be lodged in the office, to give the court power to act. H. & H. 559, sect. 48. The technical objections of the defendant in error will not avail him, because he has not put any case in court, so far as the record exhibits. He has not shown the existence of facts necessary to confer jurisdiction.

The judgment must therefore be reversed.

MILTON H. CARSON and OWEN W. SAXON, Use of William B. Dozier, *vs.* WILLIAM H. FLOWERS.

Where the answer to a bill of discovery is used, it is evidence for or against the party using it; but the bill of discovery may be dismissed, and other evidence resorted to.

If the party who prays for a discovery does not use the answer, it is not his evidence, and he cannot be concluded by it, and he may introduce other evidence to establish the fact in reference to which a discovery was sought.

ERROR from the circuit court of Smith county; Hon. Thomas A. Willis, judge.

This was an action of assumpsit, by Milton H. Carson and Owen W. Saxon, partners, doing business under the firm and style of Carson & Saxon, for the use of William B. Dozier, against William H. Flowers, founded on a promissory note for the sum of \$156 67. The defendant, by plea, under oath, denied the execution of the note. The plaintiffs then filed a bill of discovery, calling on the defendant to answer whether he did not make the note, &c. The defendant answered, and again denied the execution of the note. At the trial the plaintiffs did not use the answer to the bill of discovery, but offered to prove, by several witnesses, that the defendant admitted the note to be genuine, and said he would pay it; but the court refused to permit the evidence to be given, because it contradicted the bill of discovery and answer, and the plaintiffs excepted. The defendant then read to the jury the bill of discovery and answer, and rested his case. After which, and as rebutting evidence, the plaintiffs again offered to prove that the defendant had several times admitted the note to be good against him, and promised to pay it; but the court again rejected the evidence, and the plaintiffs filed a second bill of exceptions. After a ver-

Carson & Saxon v. Flowers.

dict and judgment for the defendant, the plaintiffs moved for a new trial, and introduced affidavits, showing that the evidence offered on the trial had been discovered since the bill of discovery had been filed; but the court overruled the motion, to which the plaintiffs filed a third bill of exceptions, and removed the case to this court, by writ of error.

Joseph Heyfuon, for plaintiffs in error.

PER CURIAM. The plaintiff in error brought this suit on a promissory note. The defendant denied the making of the note, under oath, and the plaintiff filed his bill of discovery, which the defendant answered, again denying the making of the note. The bill of discovery and answer were not used on the trial by the plaintiff, but he offered to prove by two witnesses, that Flowers had acknowledged the genuineness of the note, but the testimony was ruled out, as being inconsistent with the allegations in the bill of discovery. On an application for a new trial, it seems the plaintiff introduced affidavits showing that the testimony offered on the trial had been discovered since the filing of the bill of discovery. In ruling out this testimony we think the court erred. When the answer to a bill of discovery is used, it is evidence for or against the party using it; but the bill of discovery may be dismissed, and other evidence resorted to. If the party who prayed the discovery does not use the answer, it is not his evidence, and he cannot be concluded by it, but may introduce other evidence to establish the fact in reference to which discovery was sought. The rule has been ever held to be that, after a party has introduced an answer, he may disprove the allegations which are detrimental to his cause. *Nourse v. Gregory*, 3 Littell, 378, cited 3 Phil. Ev. 926, note 642. Whether the rule goes to this extent we need not now decide.

Judgment reversed and cause remanded.

JOHN PREWITT vs. MICAJAH BENNETT, and JOSIAH BENNETT, Executors of Stephen Bennett deceased, use of Duncan S. Morris.

A plea denying the character in which the plaintiff sues, and not supported by oath or affirmation, when the face of the record does not evidence the truth of the fact set forth by the plea, is not merely informal, but is deficient in one of the substantial requisites of the statute, and may be stricken out as a nullity.

ERROR from the circuit court of Choctaw county; Hon. Hendley S. Bennett, judge.

This was an action of assumpsit, brought to the September term, 1844, of the circuit court of Choctaw county, by Micajah Bennett and Josiah Bennett, as executors of Stephen Bennett, deceased, for the use of Duncan S. Morris, against John Prewitt; founded on a promissory note for five hundred and ninety-two dollars, dated July 27th, 1819, and payable one day after date. At the return term, the defendant filed five pleas. 1st. That Morris, the usee, was not the legal holder of the note sued on; 2d. That Micajah and Josiah Bennett, never were the executors of Stephen Bennett; 3d. That the note sued on was the property of the estate of Stephen Bennett; 4th. That the note was paid before the commencement of the suit; and 5th. The statute of limitations. Neither of the five pleas was sworn to. The plaintiffs demurred to the first and third pleas, and replied to the second, fourth and fifth, but afterwards, by leave of the court, withdrew the demurrers to the first and third pleas, and the replication to the second; they then replied to the first and third pleas, and refused either to reply or demur to the second. Whereupon the defendant moved the court for a judgment on the second plea; the court overruled the motion, and upon motion of the plaintiffs, ordered

the second plea to be stricken out as a nullity; to which the defendant excepted. After a verdict and judgment in favor of the plaintiffs, the defendant removed the case to this court by writ of error.

Asa and *Huie*, for plaintiff in error.

From the bill of exceptions taken in this cause, it appears that before the same was submitted to the jury the plaintiff in error moved the court for a judgment on his second plea, for want of a replication to the same, which the court refused to render, but ordered said second plea to be stricken out. This the plaintiff assigns as error.

Sheppard, for defendants in error.

1. The second plea was a nullity, it presented matter in abatement, and had been waived by pleading to the merits.

2. It was not verified by affidavit, as required by the statute.

This is the only question in the case, and the court did not err in ordering the plea to be stricken out, and giving the plaintiff leave to withdraw his replication. *Miller v. Brooks*, 4 S. & M. 176.

Mr. Justice TEACHER delivered the opinion of the court.

Writ of error to Choctaw county circuit court. The plaintiff in error filed a plea to the action, the object of which plea was to call in question the character in which the plaintiffs below instituted their suit, and to require proof of such character. This plea was not verified by oath or affirmation. At a stage of the trial below, the plaintiff in error moved the circuit court for judgment, because of the want of a replication to this plea; but that court overruled the motion, and directed the plea to be stricken out as a nullity. This action of the court is claimed as error.

By our statutes, a plaintiff is not required to prove his description of character set forth in the declaration unless it be denied by plea, and its truth attested by oath or affirmation, except in cases where the face of the record itself evidences the

truth of the fact set forth by the plea. The record of this case does not bring it within that exception. The plea, therefore, being in the nature of a plea in abatement, was of a kind which, in the language of the statute, H. H. 589, § 2, "should not be admitted or received," without an oath or affirmation of its truth. It was not merely informal, but was deficient in one of the substantial requisitions of the statute, and was consequently properly treated as a nullity. *Templeton et al. v. Planters Bank*, 5 H. 172; *Vicksburg Waterworks & Banking Co. v. Washington et al.* 1 S. & M. 539.

Judgment affirmed.

JOSEPH REGAN, Administrator of Eleazer W. Haring, deceased,
vs. THOMAS STONE.

Where claims against the estate of a decedent were referred by the probate court to referees, who made a report, which was received and confirmed, and the parties, by an agreement entered of record in the probate court, agreed that the former order, appointing referees, and also their report, be set aside, and the claims in controversy referred to other referees, and the last named referees reported in favor of the claims, and their report was approved and confirmed by the court; it was *held*, that if any objection existed to the original appointment of referees, the party waived it by agreeing to set aside their appointment and report, and to the appointment of other referees.

APPEAL from the probate court of Claiborne county; Hon. William M. Randolph, judge.

The record in this case shows the following facts, to wit: that the estate of Eleazer W. Haring was declared insolvent, and commissioners appointed to audit claims against it; that the commissioners made a report refusing to allow the claims of Thomas Stone; that Stone filed exceptions to their report, and his claims were referred to referees, who reported in favor of allowing his claims, to the amount of \$4488, which report was received and ordered to be recorded. At a subsequent term Joseph Regan, administrator of the estate of Haring, filed a petition praying that the report of the referees be set aside, and the claims referred to other referees; the court refused to grant the prayer of the petitioner, and ordered the petition to be dismissed, to which Regan filed a bill of exceptions, and set out in his bill of exceptions Stone's exceptions to the report of the commissioners of insolvency, the order referring the claims to referees, their report, and the confirmation of it by the court, and prayed an appeal. Afterwards, he dismissed his appeal; and the parties, by an agreement entered of record, agreed that

Regan v. Stone.

the order appointing referees, and also their report, be set aside, and, by consent of both parties, the claims of Stone were referred to other referees. The last named referees made a report, allowing Stone \$5511 70, which was received and confirmed by the court. The administrator, by his counsel, appeared in open court, and excepted to the report of the referees last named, and to the confirmation of the same by court, "because the court erred in the rejection of the report of the commissioners of insolvency, and the appointment of referees, without good cause being shown by the claimant why his said claims should be referred," and then prayed an appeal to this court.

J. H. Maury, for appellee.

The claims of Stone on the estate of Haring having been rejected by the commissioners, he filed exceptions to their report, which were sustained by the probate court; and the claims were referred to referees. The referees decided in favor of his claims; and, their report being approved and confirmed by the court, Regan entered exceptions to the decision of the court; and takes the ground, not that the decision of approval was wrong, but that the claims ought not to have been referred. His objections, if true, might have been taken to the order of reference; but, if applicable only to the order of reference, they came too late, when raised on the question of confirmation.

It was decided by this court in a case between these same parties, (4 S. & M. 691,) that an appeal could not be taken from the order of reference; and it is clearly inferrible from the decision, that this court will regard the order as having been properly made, unless it is shown by proof to have been wrong. But whether right or wrong, and though an appeal cannot be taken until after a final decision on the claim, yet the party asking for a reversal must depend on his exceptions; and exceptions to the final decision cannot extend back to interlocutory orders, to which no exceptions were taken at the time; because, unless exceptions are taken at the time of making

the orders, the record can furnish no means of showing whether they were right or wrong. But, to obviate all these questions, the parties, after the decision of this court, entered into an agreement that the order of reference so much complained of, and the report of the referees, should be set aside; and that the claims should be referred to the decision of new referees, selected and named by the parties. The confirmation of the report of the referees, thus appointed by his own agreement, is the judgment of which the appellant complains; and he excepts to it on the old ground that the first order of reference ought not to have been made.

When the new referees, appointed by agreement of the parties, made their report, allowing the claim, it was not competent for the party, in the face of his own agreement, to object to their report on the ground that the reference should not have been made.

Mr. Justice CLAYTON delivered the opinion of the court.

This cause was once before in this court, and is reported 4 S. & M. 691. When it went back to the probate court of Claiborne county, at the December term, 1843, it was agreed between the parties, and so entered upon the record, that the former report of the referees should be set aside, and the claims in question referred to other referees therein named. These last referees, at the February term, 1844, reported in favor of the claims of Stone, and their report was approved and confirmed by the court.

The record then states "that the administrator excepted to the appointment of the referees, without good cause being shown why the claim should be referred, and to the confirmation of the report. If any objection existed to the original appointment of referees, the party has waived it by agreeing to set aside their appointment, and by farther agreeing to the appointment of others.

There is no bill of exceptions, nor anything in the record, to show any error, if any exist, either in the report of the referees, or in the order confirming it.

The same is therefore affirmed.

ROBERT J. SANDFORD vs. A. CAMPBELL & Co., use of John R. Chester.

If the amount sued for be not ascertained by an instrument of writing, nor a sum certain, a jury is necessary to inquire of damages.

C. sued S. in an action of debt on a bill single, a promissory note, and an open account. And a final judgment was rendered without a jury to inquire of damages: *held*, to be erroneous.

ERROR from the circuit court of De Soto county; Hon. James M. Howrey, judge.

This was an action of debt brought by Erastus T. Collins and Andrew Campbell, partners, under the name and style of A. Campbell, & Co., for the use of John R. Chester, against Robert J. Sandford, for \$900.81 $\frac{1}{2}$, founded on two bills single, the one for \$811.99, and the other for \$53.80; one promissory note for \$25.62 $\frac{1}{2}$, and an open account for goods sold amounting to \$9.40.

On the first bill single, was the following indorsement, to wit: "\$230, of the \$560, is Hernando money, payable in New Orleans, which, if it cannot be used at par, Mr. Sandford is to redeem with par funds; also, \$100, West Railroad bill, is to be redeemed if it is not passed at par." The defendant failed to appear and plead, and judgment by default was rendered against him for "380.12 $\frac{1}{2}$, the balance of the debt in the declaration mentioned, and \$58.27 damages for the detention of the same." The defendant brought the case to this court by writ of error.

D. Shelton, for plaintiff in error.

First. The judgment instead of being final should have been interlocutory with a writ of inquiry.

1. An account for goods, wares and merchandise, constituted a part of the demand sued on, and was the subject of one count

in the declaration. Our statute enacts that where the sum due does not appear by any instrument of writing, if the defendant do not plead, &c., an interlocutory judgment may be taken, on which a writ of inquiry shall be awarded, &c. &c. H. & H. 616.

2. An action on an account for goods, wares and merchandise is not for a sum certain on which, at common law, judgment final might be recovered.

In debt upon a bond or promissory note for the payment of money, by the default, the defendant admits the promise in writing to pay the money as alleged. So in debt for so much money loaned, the defendant admits the loan of the amount of money alleged in the declaration, and since money was not to be valued by a jury, a computation by figures is all that is necessary to ascertain the amount due; so too, in an action for goods, wares, and merchandise, by the default, the defendant admits something to be due for goods, wares, and merchandise, but the amount and value thereof is not admitted, but is wholly uncertain, and can be ascertained only by proof, that must be made before a jury. The true rule is, that when the matter of inquiry depends exclusively upon figures, it may be computed by the clerk, and not otherwise; therefore when upon the inquiry, the defendant may admit the contract as stated in the declaration, and yet give evidence to reduce the verdict, a jury must be called. 4 T. R. 275, 276; Ibid. 493; 8 T. R. 648; 2 Saund. R. 107 a, n. b.; Tidd's Prac. 514, 515; 1 Ch. R. 619, 620, b.

3. The interest could not be ascertained in this case without a jury, because upon the account a jury might, and could properly have refused to allow interest by way of damages. In such a case the clerk cannot compute the interest, and a jury must find it by way of damages. 8 T. R. 395.

Second. The sum of \$380.12, being the pretended balance of the debt for which judgment was rendered, is not the true balance; unless the Hernando money, mentioned in the credit, was estimated at less than specie, it should be \$340.82.

Without a jury no such discount could be made, because it

must be ascertained upon proof of the value of the money.
1 Ch. Rep. 619, 620, b.; 4 T. R. 493.

Van Winkle and *Potter*, for defendants in error.

It is assigned for error that the judgment was final, when it should have been a judgment with an inquiry of damages.

1. This was not error. This court has decided that a judgment by default final on an assessment of damages by the clerk, is "a judgment after inquiry of damages," within the meaning of the 91st sec. of the circuit court law. Rev. Code, p. 124; H. & H. p. 591, sect. 11; *Gridley v. Briggs, Lacoste & Co.* 2 How. 833. That section declares such a judgment shall not be reversed for any matter which would not be cause to reverse a judgment upon the verdict of a jury. If then the legal effect of this judgment is the same as if it had been rendered upon a verdict, can it be objected that a jury did not pass upon this account for \$9.40? The statute of 4 Ann. c. 16, sect. 2, is like our statute, and the English courts hold that a want of inquiry of damages is aided by their statute. 1 Tidd's Prac. 583; *Mallory v. Jennings*, 2 Stra. 878; *Longman v. Fenn*, 1 H. Blackstone, 543, n. a.

Another statute provides for an assessment of damages by the clerk on any judgment by default "in actions of debt, for a sum certain." How. & H. p. 616, sect. 9. This action is for a sum certain; the count for goods sold, is upon the contract to pay the very sum for the goods; "debt is upon the contract or sale, but *indebitatus assumpsit* is upon the promise;" the count is, in effect, for the very sum agreed to be paid for the goods, and the default admits the agreement. See cases cited in argument by Gibbs, in *Emery v. Fell*, 2 Durn. & East, 28. "In debt the judgment (by default) is always final *quoad* the debt." 1 Tidd's Prac. 573; 2 Arch. Prac. 33, *et seq.*; *Fenton v. Garlich*, 6 Johns. 287.

2. By his default, Sandford admitted that the amount of the three notes sued on was still due and unpaid. That amount was \$890.81, with interest, and yet the judgment was for only \$438. 39. If Campbell & Co. are content with a judgment

110 HIGH COURT OF ERRORS AND APPEALS.

Sandford v. Campbell & Co.

for less than one half of what Sandford thus admitted to be due, can Sandford complain? *Ward v. Haight*, 3 Johns. Ca. 80.

The cases cited for plaintiff in error do not reach the question before the court; they merely show when a court will direct a reference and when direct an inquiry by a jury to ascertain the amount due on a default; they do not show that an assessment like this would be error. On the contrary, the English rule is, that the court itself may in all cases assess the damages on a default. 2. Saund. Rep. 107, n. 2; 2. Arch. Prac. 32; *Collum v. Barker*, 3 Johns. 153.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of debt founded upon a bill single, a promissory note, and an open account, for goods sold. There was a judgment by default, and a final judgment rendered without a jury to inquire of damages. This raises the sole question in the cause.

It was no doubt competent to the court to enter up a final judgment, without the intervention of a jury, upon the bill single, and promissory note. This is authorized by the statute. H. & H. 616, sec. 9. But where the amount is not ascertained by an instrument of writing, nor is a sum certain, there a jury is necessary. This produces a reversal of the judgment below.

Judgment reversed.

FRANKLIN HARMON v. ROBERT W. JAMES ET UXOR.

A deed to a married woman is not void ; as to third persons it is valid, whether she can be compelled to pay for it or not ; that concerns the vendor alone. Where, therefore, B. conveyed a lot of ground to J. a married woman, and J. and her husband sued H. in ejectment for the lot ; *held*, that H. could not object to the validity of J.'s title on account of her coverture.

A deed conveying all the vendor's lots, in a certain town, is not uncertain, but is sufficient to convey all the vendor's interest, derived by a deed, from the commissioners who laid off the town.

The copy of a title bond, taken from the record thereof, duly certified, is not evidence without accounting for the absence of the original.*

In an action of ejectment by the vendee of one tenant in common against those claiming under his cotenant, it is incompetent to prove by parol, the declaration of the plaintiff's vendor, that he had, many years previous, conveyed all his interest in the land in controversy to his cotenant, under whom the defendant claimed. If such conveyance were lost, it could be set up by bill in equity.

Where a bond for title is given, the interest of the vendee is not the subject of execution sale at law, unless the purchase-money has all been paid ; and where a party to a suit in ejectment claims title through a purchase at sheriff's sale of the interest of such vendee, it seems it is incumbent on him to show that the purchase-money has all been paid by such vendee, at the time of the execution sale.

* The trial, in this case, took place in the court below, prior to the session of the legislature of 1844 ; at that session, the law, as stated in the text, was changed. (Sheet Acts, 1844, p. 230, chap. 58.) By that act, the law of 1837, Laws of Mississippi, 1824 - 1838, p. 760, entitled "An act, declaring certain copies competent testimony and for other purposes," it was provided, that "Copies of all recorded deeds, conveyances, bonds, and other instruments of writing, which are now, or may hereafter, by the laws of this state, be required, or permitted to be recorded, shall, when certified by the clerk, in whose office the record of the same is kept, be received in evidence, in any court of law or equity in this state, and be available, without accounting for the absence of the original, as if the original deed, conveyance, bond, or other written instrument, were there and then produced and proved." See *Chaplain v. Briscoe*, 5 S. & M. 298.

It seems that one tenant in common cannot maintain an action of ejectment against his cotenant or those claiming under him, without proof of ouster by such cotenant; an ouster, however, may be inferred from circumstances, and it is a matter of fact for the finding of a jury.

Whether, if a tenant in common be ousted by his cotenant, he may lawfully convey his interest in the premises, or whether the deed will be void for champerty. *Quere?* Yet if an action by those claiming under one tenant in common against those claiming under the other, the court instruct the jury, that if the deed from the tenant, under whom the plaintiff claims, was made after the ouster by his cotenant, the deed was void for maintenance, and the jury find for the plaintiff, the verdict will not be disturbed at the instance of the defendant.

A failure to join in issue by a similiter cannot, after verdict, be cause of reversal.

ON appeal from the Yazoo circuit court; Hon. Morgan L. Fitch, judge.

On the third of March, 1843, John Doe, on the demise of Robert W. James and Ann M. James his wife, sued Francis Harmon and Samuel Walker, who were made defendants in the ejectment, to recover the undivided half of lot 238, in the town of Yazoo city, formerly Manchester.

The rule entered into was a special one, confessing only the lease and entry; there was no joinder in the issue tendered by the defendant, contained in the record.

A trial was had, and verdict rendered for the plaintiffs; a new trial moved for and refused; and exceptions taken and signed thereto; from which these facts appear.

The lessors of the plaintiff read a deed, dated the 22d of February, 1830, to Thomas Bernard and Angus McNeill, from George W. Adams and others, original proprietors of the town, including the lot in controversy. They then read the following deed from Thomas Bernard. "Know all men by these presents, that I Thomas Bernard, of the county of Adams, state of Mississippi, of the first part, have bargained, sold and delivered, and conveyed to Mrs. Ann M. James of the county of Holmes and state of Mississippi, of the second part, all my interest in real estate in the town of Manchester, (now Yazoo city) in the county of Yazoo and state aforesaid, for and in consideration of a note

Harmon v. James et ux.

executed by the attorney in fact of the said Ann W. James, for the sum of one thousand dollars, dated December 28, 1842, and payable twelve months after date, which when paid will be in full payment for the above interest.

"Witness my hand and seal, December 28, 1842.

(Signed) THOMAS BERNARD. [Seal.]"

The plaintiffs then read to the jury a deed dated the 16th of February, 1838, from the sheriff of Yazoo county, to John Harmon, of all the interest which Christopher Dart had in the premises in controversy. They then proved, by W. G. Miller, that he was in possession of the property as the tenant of the defendant Walker, who was guardian of the defendant Harmon, an infant; that shortly prior to the commencement of the suit, James, one of the plaintiffs, had demanded the possession of one half of the premises from him, or one half the rent, which he had refused, as his landlord was Walker; that he and his brother, Stephen Miller, who died in 1842, had been in possession of the premises under Walker, as their sole landlord; and they never knew that anybody else claimed title to the premises; Walker once distrained, in his own name alone, for the rent. That the defendant Harmon was the only child of John Harmon.

N. G. Nye, for plaintiff, proved that he had been for some years agent of Samuel Walker, guardian of Harmon, had collected the rents of the property in controversy for him, and paid them over to him for his ward; that Walker, as guardian, exercised and claimed sole ownership over the lot in controversy, ever since his possession of it.

The plaintiff having closed his case, the defendants read a deed from James C. Hawley to Christopher Dart, to the property in controversy, acknowledged on the 14th of October, A. D. 1836.

They also proposed to read a certified copy from the records of a title bond from Angus McNeill to James C. Hawley, conditioned in the penalty of four thousand dollars, to make title to the lot in controversy with others, provided McNeill received out of certain notes on third persons, placed in his hands by

Hawley, to be sued on, the sum of eighteen hundred dollars; on the reception of which, McNeill was to give a deed. This copy, being objected to by the plaintiffs, was excluded by the court.

A. H. Morton, on the part of the defendant, testified that the defendant Harmon and his ancestor had been in the possession of the lot in controversy, and had improved it, from the time the first improvement had been put on it. Morton further offered to testify that Thomas Bernard, about the year 1835, had informed him that he had executed to one Angus McNeill a conveyance for all the interest which they owned jointly in the town of Manchester; that Angus McNeill is now an inhabitant of Texas, but of what part he did not know; that the conveyance had never been placed of record, and that diligent inquiry had been made for McNeill, but he could not be found. His testimony on these points was objected to and rejected by the court.

The court instructed the jury that if they believed, from the testimony, that the proprietors of Manchester originally conveyed to Thomas Bernard and Angus McNeill a number of lots, among which the lot now in controversy was one, and that there was no evidence of record that Bernard had ever conveyed away his interest in lot No. 238, until the conveyance to the present plaintiff, and that conveyance was intended to include this lot, the law was for the plaintiffs, and they must find accordingly. But, in order to entitle the plaintiffs to recover, if they believed Bernard and McNeill were tenants in common, they must believe that there had been an ouster committed at some time; and if that ouster was committed before the conveyance from Bernard to the plaintiff, that conveyance was void for maintenance; but if they believed, from the testimony, that a demand and refusal had been made for the possession by the plaintiffs in this action, after the aforesaid conveyance, that was evidence from which the jury might presume an ouster. The defendant then asked the court to instruct the jury that if the only evidence of ouster was the demand of and refusal by Miller to deliver up the premises, that was not sufficient. The

court refused to do so, and the defendants excepted and appealed to this court.

N. G. and S. E. Nye, for appellant, contended,

1. That, in addition to title, the appellee had to prove an *ouster*, as only a special rule, confessing lease and entry, was entered into. They cited *Adams on Eject.* 236; 4 *Johns. R.* 312.

2. That the evidence of Morton of the execution of the deed from Bernard to McNeill ought to have been admitted. *Starkey v. Lacoste*, 1 S. & M. 63.

3. That the deed to Mrs. James was objectionable. 1st. Because the consideration was the note of a married woman, acting by attorney. 2d. Its vagueness and uncertainty. *Wilkinson v. Davis*, *Frem. Ch. R.*; *Tomlins's L. D.* 551; 1 *Shep. Touchstone*, 245 - 251; 18 *Johns. R.* 107; 4 *Kent*, 466, 467; 5 *Wheat.* 359; 1 *Sug.* 183. 3d. That the deed contained no covenants of any sort, and gave no title to authorize a recovery in ejectment. 4 *Cruise's Dig.* 82 - 85; *Tuck. Com. tit. Release*; 3 *Tomlins's L. D.* 322; 1 *Inst.* 22; *Noy's Max.* 74; 1 *Inst.* 274.

4. That the conveyance to Mrs. James was void for maintenance. *Montgomery v. Hogan*, 1 *Meigs's R.*; *Bledsoe v. Little*, 4 *How.* If there was no ouster, being tenants in common, they could not recover; if there was an ouster, the deed was void for maintenance. They referred to the following authorities, on the doctrine of ouster: *Coke, tit. Tenants in Common*; 4 *Kent*, 370; *Peaceable v. Read*, 1 *East*, 568; *Doe v. Prosser*, *Cowp. R.* 217; *Fairclaim v. Shackleton*, 5 *Burr.* 2604; *McLung v. Ross*, 5 *Wheat.* 124; *Tuck. Com. tit. Tenants in Common*; *Toml. L. D. same title*; *Allen v. Hall*, 1 *McCord*, 131; *Adams on Eject.* 88.

5. The demand on Miller and the refusal by him was no ouster. *Jackson v. Stiles*, 1 *Cow.* 575.

6. The demand for the rents and profits was no ouster. *Binney v. Chapman*, 1 *Pick.* 124; 2 *Caines's R.* 215; *Jackson v. Vasby*, 7 *Johns.* 186.

7. No issue was joined to the plea denying the trespass. *Bozman v. Brown*, 6 How. 349.

W. Thompson, on the same side, contended that the writing from Bernard to Mrs. James was no deed; but a certificate that he *had conveyed*, not that he *thereby conveyed*, the interest set forth in it.

Wilkinson and Miles, for appellee.

In the first place, the special rule should not have been granted without an affidavit of the defendant, alleging that the plaintiffs claimed as tenants in common, or joint tenants. *Adams on Eject.* 263. It was granted, however, which put the plaintiff to the proof of an ouster, and for this purpose the witness Miller was called. From his testimony the jury seem to have inferred a demand of the possession of the premises by the plaintiff, and a refusal to deliver it by the tenant of the defendants, from the proof of which facts the court instructed them they might draw the inference of an ouster. *Adams on Eject.* 55, and notes; *Cummings v. Wyman*, 10 Mass. R. 468; *Brackett v. Norcross*, 1 Greenl. 91.

2. The exclusion of the testimony of A. H. Morton will probably be objected to. If this testimony was offered for the jury, we need not argue the propriety of its exclusion. If it was offered to the court, as laying a foundation for proving the contents of a lost deed, its disregard by the court was equally proper. We understand the rule to be, that the fact that the written instrument ever did exist, must first of all be proved. Then its loss must be proved, and then its contents may be established by parol. The fact of its existence must be proven by a person who has seen it; the acknowledgment of the grantor is not legal proof of such fact. *Greenl. on Ev.* 396, and authorities cited.

3. From the assignment of errors, it appears that the validity of the deed from Bernard to Mrs. James will be questioned. It will be said, perhaps, that an agreement to pay money at a future day is not a sufficient consideration to support a bargain

and sale. We believe the law to be that any consideration of value which will raise an use, will support a deed of bargain and sale, and that a promise to pay money, provided such promise can be enforced at law, will have this effect as fully as an actual payment of it. 'This appears to be admitted as law by the court in the case of *Jackson v. Pike*, 9 Cowen, 72, and in the case of *Jackson v. Florence*, 16 Johns. 48, and in fact is too plain a proposition to expend research upon it.

It may, furthermore, be intended to object to this, and that the words of conveyance are in the past, instead of the present tense, "have bargained, sold, &c." To this we answer, that all deeds are but evidence that the grantor has parted with his estate, and vested it in the grantee. They are only evidence that a feofment, grant, gift, &c. has been made. Hence the words "*dedi*," "*concepi*," &c. in the past tense, are constantly used. This view is perhaps even more clearly applicable to deeds of bargain and sale than to any other species of conveyance, since they as clearly import that the requirements of the statute of uses have been complied with, as the employment of language operating in *presenti*. The statute executes the possession to the use as well where the sealed evidence, (the deed) shews that the bargainor *has already* bargained and sold for a money consideration a landed estate, as when it shows that he does so *eo instanti* with the making of the deed. This reasoning may appear unnecessary, but it is employed to obviate the only objections that we conceive it possible to be raised to the deed. We must necessarily, in debating upon paper, anticipate objections, although such objections may never be made.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of ejectment, in the circuit court of Yazoo county, to recover an undivided moiety of a lot in Yazoo city. The plaintiffs below derived title from a conveyance made by Thomas Bernard, to whom the commissioners of the town had originally conveyed the lot in question, jointly with Angus McNeill. The plaintiff in error claims title under the same deed of the commissioners. McNeill, it is alleged, gave a title-

bond for his interest in the lots, to James C. Hawley. Hawley conveyed by deed to C. Dart, under a judgment and execution, against whom, the ancestor of Harman purchased, and upon his death the same descended to the present plaintiff in error, defendant in the court below.

There was an attempt to prove on the part of the defendant Harman, by parol, that Bernard, before he conveyed to James and wife, had said he had conveyed his interest in the premises to McNeill; that McNeill was absent in parts unknown; that the said conveyance had never been recorded; and that fruitless effort had been made to discover the residence of McNeill. It will thus be seen that it is an action by one tenant in common against another.

Various questions have been made in the argument, which will be noticed in their order. It is said that the conveyance from Bernard to the plaintiffs is void, because a married woman is not able to contract. That question cannot be raised by this party. Bernard does not appear to be dissatisfied with the conveyance, and no one else can object for him. A gift from him to Mrs. James, of the lot, would be valid, upon her acceptance of it, and a sale is, as to third persons, equally good, whether she can be compelled to pay for it or not. That concerns Bernard alone. The other objections to the deed are equally untenable. It is not very formal, it does not describe any particular lot by number, but is a general conveyance of all his lots in that town. There is no such uncertainty in this as to make the conveyance void. It is sufficient to convey all of Bernard's interest, for, by reference to the deed of the commissioners, it is seen that the lot in question was included in their deed to him. The legal title of the plaintiff is thus made out, and the right to recover established, unless an equal title be shown to exist in the defendant.

This has not been done. The original title-bond from McNeill to Hawley was not produced. A copy was offered in evidence, without accounting for the absence of the original. This was rightly rejected, as the copy, under such circumstances, was not proper evidence. *Haydon v. Moore*, 1 S. & M. 607.

The exclusion of the parol evidence of the conveyance by Bernard to McNeill, was not error. The offer was to prove by the witness, the declaration of Bernard, that he had conveyed all his interest in the lots in question to McNeill, as early as 1835. It would be of dangerous tendency to set aside a deed, to give preference to another upon a declaration of that sort. If such conveyance had ever been made, and been lost, a bill in equity against all the parties in interest, to set up the lost deed, would have been the proper mode of proceeding.

But even if the title-bond of McNeill had been admitted in testimony, it would probably not have helped the defendant. It was executed to Hawley, no deed appears ever to have been executed to him, nor is payment of the purchase-money by him shown. He conveyed to Dart, and Harmon purchased at execution sale against Dart. According to the decisions of this court, Hawley does not appear to have had any interest which was the subject of execution sale at law; he could transfer no greater title to Dart than he possessed himself—a mere equity. Whether Dart had an interest which could be sold under execution, we need not decide; it is enough to show that the title of the defendant was not equal at law to that of the plaintiff.

But it is said that there was no proof of ouster of the one tenant in common by the other, and that without such proof, verdict should not have been rendered for the plaintiff. The charge of the court contained a very fair exposition of the law. An ouster may be inferred from circumstances, and it is a matter of fact for the finding of a jury. 1 Tilling. Adams, 56; 10 Mass. 468. There were circumstances proven, from which an ouster might very properly be inferred, and we shall not disturb the finding.

Again, it is said, that if an ouster were established, if it occurred before the conveyance from Bernard to the plaintiffs, the conveyance itself is void for champerty. On this point the court charged the jury, "that if the ouster were committed before the conveyance from Bernard to the plaintiff, that conveyance was void for maintenance." This was as favorable to the plaintiff in error as he could have desired. Without ex-

120 HIGH COURT OF ERRORS AND APPEALS.

Harmon v. James et ux.

pressing any opinion as to its correctness, it is sufficient to say, that he cannot complain of it. It was incumbent upon him to prove that the ouster was previous to the conveyance, if the fact were so; and having failed to do it, he cannot complain of the finding.

The last point made, that there is no *similiter*, cannot, after verdict, be cause of reversal. 9 Yerger, 24.

The judgment is affirmed.

GEORGE W. ROSS vs. JESSE A. MIMS.

Where, on an application to the probate court to remove an executor for maladministration, oral testimony was given, but not taken down at the time, the executor having time given him until the next term to reduce it to writing; and after the decision of the court removing the executor, he had the witnesses re-examined before a justice of the peace and their testimony taken down, and the clerk of the probate court certifies to the correctness of the transcript of the evidence; *held*, that the high court of errors and appeals could not notice the testimony; it was irregular to re-examine the witnesses after trial; the evidence under the statute should have been taken down and recorded at the time.

Where an application is made to the probate court to remove an executor for insufficient security on his bond, the sureties may prove their sufficiency by their own oath, like the qualifying of bail; which being done, it then devolves on the other party to show their insufficiency by other evidence.

The judgments of inferior courts are presumed to be correct unless the contrary be shown; but where error has intervened which may have operated prejudicially, the injured party is entitled to a reversal, unless it appear of record affirmatively that the error was waived.

On appeal from the probate court of Hinds county; Hon. Henry G. Johnston, judge.

In December, 1843, Jesse A. Mims, on behalf of his wife Eliza, one of the heirs and distributees of the estate of John Dobbs, deceased, filed his petition against George W. Ross, executor of the last will and testament of Dobbs. The petition averred that Ross was wholly unsuitable to administer the estate under the will; that he had sold one of the testator's slaves without an order of court, and that his securities on his bond as executor were not sufficient; and prayed for a revocation of his letters, and that the estate be committed to some one else.

Ross made no answer to the petition; but appeared in person and by attorney, and resisted it; on the trial he offered the sureties on his official bond as witnesses in behalf of their solv-

ency; but they were rejected as incompetent, from interest, to which he excepted. The trial took place at the January term, 1844, and the court below revoked his letters, and he appealed. Following the order granting the appeal in the record is this entry, viz.: "It is also ordered with the assent of petitioner's counsel, that said Ross have until the next term, to reduce to writing the evidence in the cause."

On the 16th of February, 1844, the several witnesses who were examined at the trial deposed before a justice of the peace to their respective depositions, and the clerk certified that the testimony of the various witnesses respectively was as set out in the record and contained in their depositions. As the evidence contained in these depositions was not regarded by the court, it is not here further noticed.

Ross prosecutes this appeal.

Foote and Hutchinson, for appellant, contended,

1. That the probate court had no such power of removal for mal-administration as the petition applied for; the remedy being on the administration bond. They cited *Judge of Probate v. Phipps*, 5 How. 59; *Green v. Tunstall*, Ibid. 639; *Jones v. Miles*, 1 How. 50; *Prosser v. Yerby*, Ibid. 87; *Lehr v. Tarball*, 2 How. 905.

2. The sureties on the official bond were not interested in the controversy and were competent witnesses; and their interest, if any, was against themselves.

3. That the record did not show a *devastavit*; even if the probate court had power to inquire into it.

A. R. Johnston, on the same side.

Davenport and Greaves, for appellees, cited the following authorities: *Woolbridge v. Wilkins*, 3 How. 360; *Byrd v. The State*, 1 How. 163; *Green v. Robinson*, 3 How. 105; *Berry v. Hale*, 1 How. 315; *Maulding v. Rigby*, 4 How. 222; *Carmichael v. Browder*, 4 How. 431; *Kerr v. Roberts*, 5 How. 278; *Huston v. Hayter*, 6 How. 580; *Ferriday v. Selser*, 4 How. 506; *Townsend v. Blewete*, 5 How. 503.

Mr. Chief Justice SHARKEY delivered the opinion of the court. Mims, in right of his wife, who is one of the distributees of the estate of John Dobbs, filed his petition in the probate court of Hinds county, for the purpose of obtaining a revocation of the letters testamentary of Ross, who is the executor of Dobbs's estate. The petition charges that Ross is incompetent to manage the estate, and that he had committed acts of maladministration, and also that his sureties had become insufficient. After hearing the parties, the court decreed that the letters should be revoked, and Ross appealed. Time was given him until a subsequent term to reduce the evidence to writing. An objection is taken to the evidence, because it was taken down subsequent to the trial. It seems the witnesses were re-examined before a justice of the peace, and the clerk certifies to the correctness of the transcript of the testimony. It was irregular thus to examine the witnesses after trial. The statute provides that the evidence given on the trial shall be taken down and recorded. Regularly the judge should certify to the correctness of the testimony. This objection being well taken by the counsel for the appellee, leaves but one point for us to decide. One of the charges in the petition is, that the sureties of the executor were insufficient. The appellant introduced the sureties, and offered to examine them as witnesses, to rebut the allegation of the insufficiency of the bond, but the court refused to permit them to testify. It is competent for the court to require new sureties in case the original sureties have become insufficient. But when proceedings are instituted against an executor or administrator because of the insufficiency of the sureties, the sureties may qualify or prove their sufficiency, the regular way of doing which is by their own oath, like the qualifying of bail. If they should say on oath that they are sufficient, then it devolves on the other party to show their insufficiency by other evidence. The court therefore erred in refusing to permit the sureties to be sworn.

It is said, in argument, that this ground was abandoned by the petitioner's counsel, and that there was therefore no contest in the court below. This we cannot know, as no such thing

appears on the record. A charge of insufficiency is made in the petition, and a bill of exceptions to the decision of the court in refusing the respondent the privilege of having the sureties examined. Testimony may have been introduced to show their insufficiency, and the judgment of the court may have been predicated on their insufficiency. We are bound to presume that judgments of inferior courts are correct unless the contrary be shown; but where error has intervened which may have operated prejudicially, the injured party is entitled to a reversal.

Judgment reversed and cause remanded.

RALPH COFFMAN vs. ALFRED S. BROWN.

It is no doubt the law that a judgment upon a retraxit is as much a bar to another suit for the same cause, between the same parties, as a judgment after verdict.

It is the admission by the plaintiff on the record, that he has no cause of action, which constitutes the bar, and operates as an estoppel.

A plea "that a suit had been previously brought for the same cause of action between the same parties, in which the plaintiff, in his own proper person, came into court, and confessed that he would not further prosecute his said suit against the said defendant, but from the same altogether withdrew himself, whereupon it was considered by the court, that the plaintiff should take nothing, and that the defendant go without day," does not show a retraxit, nor a bar to the plaintiff's right of action.

ERROR, from the circuit court of Yalabusha county; Hon. James M. Howrey, judge.

This was an action of assumpsit, brought by Alfred S. Brown against Rowland T. Bryarly and Ralph Coffman on a promissory note for six thousand four hundred and forty-five dollars, to the May term, 1842, of the circuit court of Yalabusha county. At the return term, the defendant, Ralph Coffman, filed a plea in the following words, to wit: "And Ralph Coffman, the defendant, comes and defends the wrong and injury, when &c., and says the said plaintiff ought not to have or maintain his aforesaid action thereof against the defendant, because he says that heretofore, to wit, at the June term, 1840, the said plaintiff impleaded the said defendant in the district court of the United States for the northern district of Mississippi, for the non performance of the same identical promises and undertakings in the said declaration mentioned, and such proceedings were thereupon had in that court; that afterwards, to wit, in the said last mentioned term, the said plaintiff came

Coffman v. Brown.

into the said court in his own proper person, and confessed that he would not further prosecute his said suit against the said defendant, but from the same altogether withdraw himself; therefore it was then and there considered by the said court, that the said plaintiff should take nothing by his said declaration, but that he should be in mercy, &c., and the said defendant should go thereof without day," &c. To which plea, the plaintiff replied as follows, to wit: "And the said plaintiff for replication to the plea of the said defendant, Coffman, says he was impleaded in the district court of the United States in manner and form as set forth in defendant's plea, but that he did not come into court in his own proper person, and confess that he would not prosecute his said suit against the said defendant any farther, and that he did not altogether withdraw from the same; and of this he puts himself upon the country," &c. The defendant demurred to the replication, and the court held that the demurrer went back to the defendant's plea, and sustained the demurrer to the plea, and a judgment of *respondent ouster* was awarded; but the defendant refusing to answer over, a judgment final was entered against the defendants. The defendant, Coffman, brought up the case to this court by writ of error.

Waul, for plaintiff in error.

The counsel for plaintiff insists that there was error in the judgment of the court below in overruling the demurrer to plaintiff's replication.

If the plea is good, the replication is defective, as it attempts to contradict the record, which cannot be permitted, and as the plea offers to verify by the record, the only traverse admissible is "*nul tiel record*."

The cause then, in its most favorable position for defendant, must be considered as upon demurrer to the plea of *retraxit*, which differs from "*nolle prosequi*," "dismission," "non suit," "discontinuance," and all other judgments against the plaintiff in this: It is the solemn renunciation of the plaintiff in his own proper person in open court, and is a bar to all other actions of

a like or inferior nature. 3 Black. Com. 29; 6 Com. Dig. Pl. § 2, § 4, 278, 280; 1 Dun. Prac. 494; 2 Arch. Prac. 220; 2 Sel. Prac. 337; 10 Johns. Rep. 221; *Evans v. McMahon*, 1 Ala. Rep. (new series) 47; *Bowden v. Horne*, 7 Bingh. 716; *Hoffman v. Porter*, 2 Brock. 156; *Lambert v. Sanford*, 2 Black. 137; 1 Pick. 371; 20 Eng. Com. Law, 302; *Bridge et al. v. Sumner*, 1 Pick. 371. And the plea being good, the court will render the judgment that should have been rendered below, and will award it in favor of the defendant.

Should it be considered that the plea is good, and the replication well pleaded, or the demurrer defective, the judgment should have overruled the demurrer, and awarded a rejoinder, but the plea being good, and the replication defective, the judgment will be reversed, and the demurrer sustained, and judgment final for the defendant in this court.

A. C. Baine, for defendant in error.

Without entering upon the proposition, whether the technical *retraxit* would be maintained at this day, when our statute of jeofails and our whole system of practice discourage all the nice chicanery of the common law, which prevented the merits of a case being heard—it will at least be conceded that a plea so purely formal must be pleaded with all the peculiar certainty that a plea of “former recovery” should be. The plea of “former recovery” must not only allege the term at which it was had, but also the very day in the term, which the judgment was rendered. This plea does not do so. It merely states, generally, the term, without specifying any day of the term.

In the second place, be the plea good or bad, the judgment of the court must be sustained. For it has been decided in this court, until it has become an axiom, that a right judgment, founded on a wrong reason, cannot be reversed. Now the replication is undoubtedly good on general demurrer. It merely negatives the plea, thereby doing exactly what the defendant proposes to do, namely, putting him on the proof of its allegations. Indeed, the moment it is conceded the replication ought

not to have put the facts of the plea in issue, but demurred to them, that moment the plea is admitted to be faulty, and the judgment of the court unquestionably correct.

The replication concludes to the country. This I believe, if now a fault at all, never was one which could be reached by a general demurrer. But if specially demurred to, I do not think, in the aspect of the cause, it could have been sustained. Why? Because the plea, in its substantive matter, necessarily directed the mode of trial, when the facts of that plea were put in issue. And any slip of the pen of the pleader, after having put them in issue, could not have varied the mode of the trial.

The facts in issue are what the court is to look to, in directing the mode of the trial, not to what the party (or either of them) proposes as to that mode.

Mr. Justice CLAYTON delivered the opinion of the court.

The only question in this case is as to the effect of this plea of the defendant; that a suit had been previously brought for the same cause of action, between the same parties, "in which the plaintiff in his own proper person came into court, and confessed that he would not further prosecute his said suit against the defendant, but from the same altogether withdrew himself," whereupon it was considered by the court, that the plaintiff should take nothing, and that the defendant go without day." Upon demurrer, judgment was rendered against the plea in the court below.

It is insisted that this proceeding, set up as a defence in the plea, amounted to a retraxit, and that the present suit for the same cause of action cannot be maintained. It is no doubt the law that a judgment upon a retraxit, is as much a bar to another suit for the same cause, between the same parties, as a judgment after verdict. The only question therefore is, whether this be a retraxit.

The older authorities are not very clear in their statement of what amounts to a retraxit. In a late case, the rule is thus very explicitly stated. "In a retraxit, the plaintiff voluntarily abandons his cause, and goes farther, he admits that he has no

cause of action." 6 Rand. 677. It is this admission upon the record, *that he has no cause of action*, which constitutes the bar, and operates as an estoppel to the party.

On the same subject, the supreme court of the United States employs this language: "The nature and effect of a *nolle prosequi*, was not well defined or understood in early times, and the older authorities involve contradictory conclusions. In some cases it was considered in the nature of a retraxit, operating as a full release and discharge of the action, and of course as a bar to any future suit. In other cases it was held not to amount to a retraxit, but simply to an agreement not to proceed farther in that suit, as to the particular person or cause of action to which it was applied. This latter doctrine has been constantly adhered to in modern times, and constitutes the received law." *Minor v. Mechanics Bank of Alexandria*, 1 Peters, 74.

The facts pleaded in this case do not, in our view, amount to a retraxit, or to an acknowledgment upon the record by the plaintiff, that he has no cause of action. They constitute only a dismissal of the suit, or a *nolle prosequi*.

The judgment is therefore affirmed.

130 HIGH COURT OF ERRORS AND APPEALS.

Sessions et al. v. Reynolds.

7s	130
81	657
7s	130
89	506
89	511
89	578

RICHARD SESSIONS et al. vs. JOHN DOE, ex dem. JAMES M. REYNOLDS.

Under the statute of this state, H. & H. 605, sect. 24, which makes duly authenticated copies of the records appertaining and belonging to the land offices of the United States established in this state, evidence where the originals would be, the duly authenticated copy of a certificate of confirmation by the board of commissioners west of Pearl River of a Spanish grant of land, taken from the records in the land office at Washington in this state, is competent testimony, without accounting for the original.

By the statute of the Mississippi territory, which made all deeds not recorded within twelve months from their date of execution void as against a subsequent purchaser or mortgagee without notice, a subsequent purchaser or mortgagee from the same source or grantor is meant; as to all those claiming title from a different source the unregistered deed would be as valid without recording as with it; where therefore a deed was made in 1806 from a person claiming under a Spanish grant and the deed was not recorded until 1841; and in 1843 the United States government granted a patent to the land to a different party, the deed from the Spanish grantee would not be void as against such patentee.

A deed which purports to "remise, release and quit-claim" title to land is competent testimony on behalf of the releasee therein; for even though the words be not sufficient to pass an *entire* estate in land, yet they are sufficient to perfect a title in one having claim of title; and therefore as a link in the chain of title depending for its effect upon its connection with other instruments or evidence and as a constituent part of title, such deed is competent testimony.

Under the statute of this state which declares that "where the parties or witnesses to a deed reside in a foreign kingdom, state, nation or colony, the acknowledgment or proof made before any court of law or mayor, &c. certified by the said court, mayor, &c. in the manner such acts are usually authenticated by them or him, shall be sufficient," an acknowledgment to a deed purporting to have been taken before the mayor of Liverpool, and to be his official certificate, and which bears the corporate seal, but which is not signed by that officer, but is signed by the town clerk, is sufficient; the rule being that the certificate of a mayor of a foreign city is *prima evidence* in due form, or in the usual form of authenticating such acts, but it is not conclusive.

Where the validity of the certificate of a state officer is called in question, its

conformity to law is a question of law for the court, being regulated by a public law of the state; but the conformity of the certificate of a foreign officer to the foreign law is a question of fact, to be established by evidence.

Where a certificate of a foreign officer is made, the certificate is *prima facie* evidence of its conformity to law and it devolves on him who questions its admissibility to show that it is not in the usual form; to do which he must produce an authenticated copy of the foreign law, or if that cannot be had, the best evidence which the nature of the thing admits of must be produced.

Where the court below rejects proof of a particular fact, which fact can only be established in a particular way, the record must show that the proof rejected was pertinent to the establishment of that particular fact in that way; where, therefore, the bill of exceptions recited that "the defendant offered to prove" that the acknowledgment of a foreign officer was not in due form, without showing how or by what proof, and the court below rejected the proof, it was held that the record did not show that the court below had erred, and the presumption of law was in favor of its correctness.

The duly authenticated copy of a plat and survey of lands contained in a confirmation of a Spanish grant from the office of the surveyor-general of lands, south of Tennessee, is under the statute (H. & H. 605, sect. 24,) evidence; nor will the fact that in the certificate of authentication the surveyor-general puts no date make any difference; he certifies as surveyor-general, and the presumption is the certificate is true until the contrary is shown; nor will the fact, that the copy of such survey from the surveyor-general's office differs materially from the map of the same land in the register's office, exclude the former from testimony; both copies are testimony under the statute, and of equally high grade; the mistakes in the maps can only be corrected by actual surveys.

Although, as an abstract proposition, it is true that a grantor who disposes of land by a valid operative deed, cannot subsequently dispose of the same land by a valid operative deed to a different person; yet if the original conveyance be defective, the second of course would pass the estate; whether if the same person claim under both grants, he may establish his right under either, as he may please. *Quere?*

It seems that a mere release of title to land does not pass the right to land of which another person is in the actual, visible possession, claiming a right; yet it may be used as a conveyance of the estate to one in possession; or as a mean of transferring or enlarging an estate by giving some new interest; or as perfecting an imperfect and defeasible estate; and it seems that any interest in the person to whom the release is made, either by possession, by deed, or in law in his own or another's right, any vested interest without an actual possession, will be a sufficient foundation for the release to stand upon.

In a country abounding in wild land, a deed or grant is a constructive possession in the grantee sufficient to uphold a title derived by a release from one having title to the land ; where, therefore, the Spanish government granted the same land first to R. and afterward to F., and R. subsequently released to F., the constructive possession of F. under this grant will be sufficient to uphold the release from R.

Where a release of title to land was thirty-five years old, it was *held* to be of an age sufficient to draw to its support the favorable presumption of the law, that it was operative at the time of its execution ; which presumption is supported by proof of the possession of the releasee as far back as there is any evidence of possession.

The title to the whole of a tract of land, with possession of part of it, is a possession of the whole of it, and will support a release of title to the whole.

In order to defeat a release, it seems there should be proof of an actual adverse possession under a claim of right ; therefore where the release was in possession long before there was any adverse claim, and for anything that appeared to the contrary was in possession when the release was made ; it was *held*, that the release would be operative.

The objection to a release on the ground of the want of possession or other interest to uphold it in the releasee at the time of its execution, loses much of its force when made in this court for the first time ; and when the objection made to its admissibility in the court below was as to its authenticity. There are no statutes on the subject of champerty in this state ; the English statutes of 32 Hen. VIII. c. 9, on that subject, is not in force here ; in order therefore to avoid a contract on the ground of champerty, the common law offence must be complete ; to constitute which it must not only be proved that there was adverse possession at the time of sale, but that the purchaser had knowledge of such adverse possession ; this is especially the case where the land granted was in forest and wild at the time of the grant.

It seems that the English statutes as far back as the 32 Hen. VIII. are not in force in this state.

IN error from the circuit court of Adams county ; Hon. C. C. Cage, judge.

John Doe, on the demise of James M. Reynolds, sued Richard Sessions and others, in ejectment for a tract of land in Adams county ; to which, on the common order being entered into, the defendants plead not guilty.

On the trial, the plaintiff read, in evidence to the jury, a regularly executed Spanish grant for two thousand arpens of land in favor of Ezekiel Forman, dated the 1st of June, 1792 ; and a certificate of the survey of the lands therein granted by Carlos

Trudeau, the then Spanish surveyor; this patent recited that the lands therein granted are the same before granted to Jane Rumsey; he then read, in evidence, a copy of the certificate of the board of commissioners west of Pearl River, established by act of congress, regulating the grants of land, and providing for the disposal of the lands of the United States south of the state of Tennessee, confirming to the legal representatives of David Forman the two thousand arpens granted by the Spanish government to Ezekiel Forman; this confirmation was dated on the 27th of February, 1806; the plaintiff then read to the jury a quit-claim deed from the legal heirs of David Forman, deceased, to James M. Reynolds, the lessor of the plaintiff, dated March 13, 1834; he read also the certificate of the register of the land office at Washington in Adams county, that William Gordon Forman had, on the 30th of March, 1804, as the surviving executor of the last will and testament of David Forman, filed his notice of his claim to the two thousand arpens, under the grant to Ezekiel Forman, and a deed from the executors of Ezekiel to David Forman; and that this claim, on the 30th of November, 1804, was laid before the board of commissioners, with the proper documents in its support, and on the 27th of February, 1806, was allowed and confirmed.

The plaintiff then read, in evidence, an order of survey, and a survey made for Jane Rumsey in 1786, and a complete Spanish grant to her, dated the 8th day of October, 1787, to the same two thousand arpens granted to Ezekiel Forman. He then read a certificate of confirmation by the board of commissioners, similar to confirmation of Forman's grant, dated the 3d day of July, 1805; at the foot of this confirmation was this attestation: "I hereby certify that the within certificate is truly copied from the records in this office. Given under my hand the 12th July, 1839. Thomas W. Newman, register of the land office." The defendant excepted, because the court below permitted this copy to be read without proving the loss of or accounting for the original.

The plaintiff then read this deed: "This indenture, made this 18th day of December, A. D. 1806, between Lacy Rumsey,

12*

of the county of Jefferson, in the Mississippi territory, of the one part, and William Gordon Forman, of the city of Natchez, of the other part, witnesseth that the said Rumsey, for and in consideration of the sum of two thousand dollars to him in hand paid by the said Forman, the receipt whereof is hereby acknowledged, hath remised, released, and forever quit-claimed, and by these presents doth remise, release, and forever quit-claim unto the said Forman, his heirs and assigns forever, all the right, title, interest and claim; whatsoever, both at law and in equity, of him the said Rumsey, of, in and to the following tract of land, (the deed here described the two thousand arpens of land, patented to Jane Rumsey, deceased, and which the grantor claimed as her heir at law,) to have and to hold the above described tract or parcel of land, with all the privileges and appurtenances thereto belonging, or in anywise appertaining to the only proper use, benefit, and behoof of him, the said William Gordon Forman, his heirs and assigns forever. In witness, &c."

This deed was acknowledged by one of the subscribing witnesses on the 30th day of November, 1807, before Thomas Rodney, Esq., one of the superior judges for the Mississippi territory, and was filed for record in the probate clerk's office, on the 10th day of March, 1841.

The defendants objected to the introduction of this deed, without further proof, and in support of their objection, read to the court the patent from the United States, under which they claimed, dated in 1823; the objection was, however, overruled, and exceptions taken.

The plaintiff then read a deed from William Gordon Forman, who was admitted not to be an heir of David Forman, deceased, to George Salkeld, dated the 1st of March, 1811, for one moiety of the land included in the grant to Ezekiel Forman, and another deed from the same to the same, dated July 3, 1811; he also read a deed from George Salkeld to Thomas B. Barclay, George P. Barclay and Frederick M. Barclay to the same land, dated May 6, 1820; he then offered a paper purporting to be a power of attorney, from Thomas B., George P., and Frederick

M. Barclay, of England, to Robert Lyons, dated 26th September, 1827, authorizing Lyons to sell and convey this land; this power of attorney, after being duly signed and sealed by the makers, was attested, and certified as follows: viz. "Witnesses to the signature of Thomas Brockhurst Barclay, G. W. Crooke, R. Gladslock. Witnesses to the signature of George Pearkes Barclay and Frederick Maud Barclay, F. J. Manillier, John Shakspeare, Jr.

" *London*, to wit :

" Frederick John Manillier, of Little Trinity Lane, gentleman, maketh oath, and saith that he, this deponent, together with John Shakspeare the younger, was present, and did see George Pearkes Barclay and Frederick Maud Barclay, two of the constituents named in the letter of attorney hereto, duly sign, seal, and as and for their acts and deeds in due form of law deliver the said letter of attorney to and for the uses and purposes therein mentioned; and this deponent further saith, that he, together with the said John Shakspeare the younger, also present, did see the said George Pearkes Barclay and Frederick Maud Barclay sign the schedule annexed to the said letter of attorney, and that the names or signatures, 'George P. Barclay and Frederick M. Barclay,' thereto set and subscribed as the parties executing the said letter of attorney and signing the said schedule, are of their proper handwriting, and that the signatures, F. J. Manillier and John Shakspeare, Jr. thereto set and subscribed as the witnesses to the due execution thereof, are of the proper handwriting of this deponent and the said John Shakspeare the younger.

" Sworn at the Mansion House, London, this 2d of October, 1827, before A. Brown, Mayor. F. J. MANILLIER."

Appended to this certificate was the certificate of Thomas Aspinwall, consul of the United States at London, that the signature A. Brown, mayor, was that of the Hon. Anthony Brown, lord mayor and chief magistrate of the city of London, and that the seal thereto affixed was that of the mayoralty of the city.

There was, in addition, a full certificate of the mayor, under the corporate seal, of the oath taken by F. J. Manillier before him, and the contents of that oath, as set forth above.

Robert Gladstone, Jr. appeared before Thomas Littledale, mayor of Liverpool, and made oath of the signing of the power of attorney by Thomas Brockhurst Barclay, similar to that taken before the mayor of London. The signature to the affidavit was in these words: "Sworn at Liverpool aforesaid, the 6th day of October, 1827, before me, Thomas Littledale, mayor." Then followed a certificate of Gladstone's having made the oath as stated; the certificate was similar to that of the mayor of London in its recitals, and commenced as follows, viz.:

"To all to whom these presents shall come:

"I, Thomas Littledale, Esq., mayor of the borough and town of Liverpool, in the county palatine of Lancaster, and kingdom of Great Britain, &c. do hereby certify that on the day of the date hereof, personally appeared before me Robert Gladstone the younger, of, &c."

It concluded in this way, viz.: "In faith and testimony whereof, I the said mayor have caused the said seal of mayoralty of the said borough and town to be hereunto put and affixed, &c. dated at Liverpool the 6th day of October, in the eighth year of the reign of our sovereign lord George the Fourth, by the grace of God king, &c.; in the year of our Lord, 1827.

"By order of the mayor,

[L. s.]

"STATHAM, *Town Clerk.*"

There was also a certificate by the consul of the United States at Liverpool, that Thomas Littledale was the mayor of Liverpool. To the introduction of this power of attorney the defendants objected, and offered to prove, in support of their objection, that it was not authenticated according to the usages of the city of London; that the mayor of London usually certified under his official seal. The objection was overruled, and the proof excluded and exceptions taken.

The plaintiffs then read a deed from Lyons, as agent and at-

torney in part for the three Barclays, to the lessor of the plaintiff, of the land in controversy, dated in May, 1828.

The plaintiff then offered a copy of a map of a survey made by George Davis, D. S. of the Lacy Rumsey certificate, which was certified as follows, viz. :

"I certify that the foregoing is a true copy of the survey of Lacy Rumsey's claim, as on record in this office.

"VOLNEY E. HOWARD,

"Surveyor General of Public Lands South of Tennessee.

"*Surveyor's Office, Jackson, Miss.*"

To the introduction of this map the defendants objected, and proved, in support of their objection, by Thomas W. Newman, register of the land-office at Washington, Miss., and late a clerk in the surveyor-general's office, that by the rules of the surveyor-general's office, no plat made by a deputy surveyor was complete without the approval of the surveyor-general marked on it; that Freeman was surveyor-general, while Davis acted as deputy surveyor; that there was no such paper as the one offered in evidence among the records of the register's office at Washington; but on the contrary, a materially different survey and plat, approved by Thomas Freeman, the surveyor-general, was of record in that office; the court below overruled these objections and permitted the survey and plat to be read to the jury, to which exceptions were taken.

The bill of exceptions then recites, that various and conflicting testimony was then introduced in relation to the eastern limit of said Forman and Rumsey tracts, by which the plaintiff attempted to prove that the said grants, or at least one of them, included the tract in dispute, and admitted to be in possession of the defendants. It was also proven that a portion of the lands in dispute were and still are forest, and the whole tract not surrounded by any fence or enclosure, but that a portion was under fence and in cultivation by the defendants or those claiming under the same title, ever since 1832, and that the plaintiff and the said Barclays and Salkeld, under whom he claimed, had for many years a plantation in cultivation on the part of the said Forman and Rumsey grants; but it did

not appear that, with these exceptions, either party had previously actual occupation by enclosures of the whole of said disputed lands."

Other testimony on the part of the defendants was introduced, touching the question of boundary, which it is not deemed requisite to notice further.

Ten instructions were asked for by the plaintiff's counsel, and given; it is deemed necessary to notice only the following:

1. "The plaintiffs have shown a complete legal title emanating from the Spanish government, in two grants, one to Jane Rumsey, the other to Ezekiel Forman; and if the land in controversy is embraced by either of said grants, the plaintiff is entitled to recover, unless the defendants have shown a superior title.

2. "Adverse possession to defeat a deed for maintenance, must be a possession by actual visible boundaries and occupancy; or by exercising acts of ownership."

The defendants asked the court to instruct the jury: 1. That if the jury find that at the time of the execution of the deed from the heirs of Gen. David Forman to James M. Reynolds, the defendants, or those under whom they claim, were in notorious possession of the land in controversy, under an adverse title, such as a patent from the United States, said conveyance of so much of the land thus conveyed was void, and no title passed thereby.

2. That if the jury find that at the time of the conveyance from Forman's heirs to Reynolds, the defendants, or those under whom they claim, were in actual adverse possession of a part of the land in controversy, and claiming adversely the whole tract, the conveyance as to so much of the land thus claimed was void.

These instructions were refused; and the whole case embodied by the defendants in a bill of exceptions.

The jury found for the plaintiffs below, and the defendants sued out this writ of error.

They now assign for error:

1. The admission of the certificate of confirmation of the Rumsey grant.
2. The admission of the deed of release of Rumsey to Forman.
3. The admission of the power of attorney of the Barclays, and the exclusion of the proof touching the custom of the mayor of London.
4. In admitting the plat and survey from the records of the surveyor-general's office.
5. In giving the plaintiffs' charges to the jury.
6. In refusing the defendants charges.

Quitman and *McMurren*, for plaintiffs in error.

1. The grant to Ezekiel Forman, by the Spanish government, is utterly void. These identical lands had previously, in 1787, been granted to Jane Rumsey. Neither the sovereign power of a country, nor an individual, can make a second grant for the same land. In such case the last grant will be utterly void. We have been informed that this point has been thus decided by this court, and so are the authorities.

2. The conveyance of the heirs of David Forman, who resided in New Jersey, was made March 13, 1834. At this time the defendants were in possession, under a patent from the United States, and it does not appear from the record that the heirs of David Forman were ever in possession of the disputed premises. A conveyance made by a disseised party, of lands held adversely by another, conveys no title. *Bradstreet v. Huntington*, 5 Pet. R. 434; 3 Mass. 575; *Bledsoe v. Little*, 4 How. 24; *Weart v. Brown*, 7 Ibid. 181; 11 Mass. 554.

3. It cannot be said that the defendants had not such adverse possession as would entitle them to set up this defence. In 1832, it appears, they were cultivating a portion of the land included in their patent, and claiming the whole, according to the United States survey. If the whole was not actually possessed and occupied, by inclosure, still, in law, their possession extended to the whole area covered by the patent. The public records of the land-office notoriously showed the extent of the

patent, and their claims. The adjustment of the surveys belonged to the United States land-offices, and the sale to Joseph Sessions was made according to the surveys in the land-office, recorded and approved. This survey showed that the land in possession of defendants, and now in controversy, was clearly included within the patent to Sessions. A *pedis possessio*, or an occupation of every part of the tract, by boundaries, is not, therefore, necessary, to establish the adverse possession. 5 Pet. 319, 402; 10 Ibid. 414; 4 How. R. 24; 7 Ibid. 181.

4. The quit-claim, or release, of Lacy Rumsey to W. G. Forman, contains no words of grant, or conveyance of title. The words are, remised, release, and quit-claim. These words may perfect a title in one having a claim of title; but of themselves they convey no estate whatever. No title will pass by a release, when neither party has possession. *Mayo v. Libby*, 12 Mass. 347; *Warren v. Childs*, 11 Ibid. 222; *Porter v. Perkins*, 3 Ibid. 237.

5. If, however, we are mistaken in the operation of this release, we insist that the instrument was improperly admitted in evidence. 5 Pet. R. 344. There was no proof of its execution, and it was not recorded at the time of the demise laid, or even at the date of the institution of the suit. The defendants were purchasers, for a valuable consideration, without notice. As to them this release was unrecorded, and void. It was also improperly recorded, in 1841.

6. Again, no title to the Rumsey grant passed by the deed of William Gordon Forman to G. Salkeld, in 1811. They purport only to convey the "lands granted by the Spanish government to Ezekiel Forman."

7. We think it is evident that the paper admitted in evidence, purporting to be a duly authenticated power, should have been rejected upon the proof offered. Independently of our statute, it would have been necessary to prove this instrument, by the usual rules of evidence. In departing from these the statute must be strictly pursued. It provides (How. & Hutch. 346, § 14,) that the acknowledgment, or proof, "shall be certified by such foreign court, mayor, or magistrate, in the

manner such acts are usually authenticated by them." This power of attorney is not certified by the mayor of London, or Liverpool. The name of neither of these magistrates is appended to the certificate, and the court refused to receive proof that the certificate was not made in the manner such acts are usually authenticated.

8. The first and tenth instructions, given for the plaintiff, must be held bad, if we have shown that but one of the titles set up was imperfect. For instance, if the Forman grant is void, it was error in the court to instruct the jury that both titles were complete, and that if they found the land in controversy not embraced in the valid title, but included in the void grant, still, the plaintiff would be entitled to recover. These instructions are so broad that, if either of the Spanish grants should be held invalid, or if the chain of title under either is not perfect, there is palpable and fatal error in the instruction.

9. For the purpose of showing that the Rumney grant extended over the tracts in dispute, the plaintiffs offered the plat, signed George Davis, D. S. This paper was objected to, but admitted. In this the court erred,

1st. Because the certificate of Volney Howard has no date, and it does not appear to have been made by him while surveyor-general.

2d. Because it never was approved by the surveyor-general.

3d. Because it was not made in conformity to law, or the practice of the land-office.

4th. Because it appears that another and materially different survey of that grant, was approved, and remains of record.

It has been decided that Spanish grants of lands in Adams county had no intrinsic validity. That their validity arises entirely out of the articles of agreement and cession with Georgia, and the subsequent acts of congress. These also provide for the ascertaining and locating of these grants, and we contend that their location by the authorities of the United States should be conclusive. In this case the plaintiff did not show any location but that made under the United States; and certainly it was erroneous in the court to admit a plat, or a

copy of a plat, which was proven to be incorrect, and in conflict with the plats which were approved and filed in the register's office, as a guide to those entrusted with the sale of the public lands.

10. The grant to Forman was specifically for the same identical land previously granted to Rumsey. If, therefore, the surveyor, in running out the Forman grant, had embraced within the lines of the survey lands not contained in the Rumsey grant, it would be but an error in the surveyor; such excess of lands could not pass by the grant. Again, if the grant on its face is for lands previously granted, it is void in toto.

11. The court clearly erred in refusing the instructions asked for by defendants, as an inspection of the cases above referred to will show, and we consider these questions arising out of these instructions settled by this court, in the cases of *Bledsoe v. Little*, and *Weart v. Brown*, above cited.

Dubuisson, on the same side.

1. Where there are two grants for the same thing to different grantees, they cannot both be valid. A deed of gift conveys all that it purports to convey from the grantor. If it be absolute, his rights in the subject are all gone from the time of sealing and delivering the deed, and his own act cannot revoke it. The same principle applies to governments as to individuals. A government cannot revoke its own grants, but the grantee acquires a conclusive title against the grantor.

2. The claim of title from the Ezekiel Forman Spanish grant is not complete without the quit-claim deed from the heirs of David Forman, made in 1834. W. G. Forman, to whom the plaintiff traces his title, was not an heir of David Forman, and his deed to Salkeld in 1811 was a disseisin of those who claimed title under the Ezekiel Forman grant.

3. We contend that the quit-claim deed from the heirs of Daniel Forman gave no title to the plaintiff; 1. Because the grant to Ezekiel Forman and the confirmation by the commissioners, were void, as has been seen, the grant and confirmation to Rumsey being prior in date; and if they had no title they could

give none. In a quit-claim deed, the grantor does nothing more than to acquit the grantee from any title or right in action which the grantee may have. 2 How. 60, 609. A release is giving or discharging of a right or action which a man hath against another, or that which is his; or it is the conveyance of a man's interest or right which he hath unto a thing, to another who has the possession. 1 Sheppard, 320. 2. The deed is void as to the defendants in this action; because the plaintiff was holding the lands adversely to them, and their release to him only acquitted him of their right to what he had in possession. An estate in lands cannot pass by quit-claim. Ibid. 320; 4 Coke, 25.

The right to a freehold *in presenti* or *in futuro* may be released, 1. To the tenant of the freehold in deed or in law; 2. To him in remainder; 3. To him in reversion; but not to a mere stranger. A distinction is made between the grant or assignment of choses in action to a stranger and a release of rights to the terre-tenant. Ib. 322. Again; in all cases of a release of a bare right of freehold in lands, he to whom the release is made must have, at the time of making the release, the freehold in possession, remainder, or reversion; for rights of entry and actions and the like are not transferable to strangers but are thus to be released. Ib. 327. The whole extent and meaning of releases is to quiet claims; not to transfer rights of action and entry. They cannot *create* estates, but perfect imperfect ones. 5 Mason C. C. R. 16; 4 Cruise Dig. ch. 6.

It is a general rule of law, that a deed made by a person out of possession at the time, though he have the legal right, is void. The law will not suffer a man to sell a quarrel, or as it is commonly called, a pretended title. Such conveyance is an offence at common law and by statute of 39 Hen. VIII. 2 How. 347; 5 Mass. 236, 237; 11 Mass. 554.

Lord Coke, in speaking of this statute, says, A man may make a pretended title in two ways. 1. When it is merely a pretence, and nothing in verity; 2. Where it is a good title and right in verity, and made pretended by act of the party; and both are within the statute. 3 Thomas's Coke, 426, 427; Tenn. Rep. 101.

"The deed of one disseised is utterly void. His freehold is then held to be out of him, and his title is converted into a right of action, and, as such, no more subject of transfer than an ordinary chose in action." 5 Peters, 436; 3 Mass. 573; 7 Law Library, 170.

4. The necessity of possession, actual or legal, on the part of the vendor of land, in order to make a valid conveyance, is imperative. A deed to land held adversely is void. See further on this point 8 Johns. Rep. 220; 1 N. Car. Rep. 114; 4 Kent, 446; 3 Johns. Chan. Cases, 101; 24 Wend. 8, 587; 1 Peters's C. C. R. 49; 1 Munf. 162, 163; 3 Call, 411; 5 Peters, 436; 1 Inst. 214; 2 Hilliard's Dig. 130; Pertle's Dig. 154; 4 How. 24; and the case of *Brown v. Neast*, reported in 7 How. These authorities are conclusive on the point, and the decisions of our own court go as far as any of them.

5. The next question is, whether the proof for the defendants in the cause was sufficient to entitle them to this defence. In the case of *Prescott v. Nevers*, 4 Mason C. C. R. 326, it is said that when a party enters into possession under an unrecorded deed claiming title to the entirety, and exercising acts of ownership, it is a disseisin of all persons who claim title to the same land to the extent of the boundaries of the deed. "When a person enters under a deed or title, his possession is coextensive with his deed or title. And although the deed may turn out to be deceptive or void, yet the true owner will be deemed disseised to the extent of the boundaries of such deed or title. This, however, is subject to some qualification; for if the true owner be at the same time in possession of part of the land,—that is, in the disseisor's deed,—claiming title to the whole, then his seisin extends by construction of law to all the land which is not in the actual possession by an enclosure or otherwise of the party claiming under a defective title or deed." 5 Peters, 319; 4 Peters, 418.

Again, an entry into possession of a tract of land under a deed containing specific metes and bounds, gives a constructive possession of the whole tract, if not in adverse possession, although there be no fence or enclosure around the ambit of the

tract, and actual residence on only a part of it. To constitute actual possession it is not necessary that there should be any fence or enclosure round the land. 10 Peters, 414. Again, when there has been an entry under color of title by deed, although the actual settlement and improvement were only on a small part of the tract only; in such case when there is no adverse possession, the law construes the entry to be coextensive with the grant to the party, upon the ground that it is the clear intention to assert such possession. 10 Peters, 414; *Bledsoe v. Little*, 4 How. 24.

6. We contend, that there is a fatal breach in this chain of title, and the plaintiff has no rights under the Rumsey grant. 1st. The release was utterly void, and vested no estate in Forman, and his deed to Salkeld conveyed no right, for he had none. 2d. Our statute provides that an executor shall make no profit by or from his decedent's estate. And it is well settled that if a trustee, executor or agent, buy debts due his *cestue que trust*, testator or principal, the profit in the purchase belongs to the person or estate for whom he acted. *Prevost v. Gratz*, 1 Peters C. C. R. 364.

But suppose that the quit-claim divested from Rumsey, the grantor, all of his rights, and that it be intended by law that W. J. Forman took under it as executor of David Forman, and for the benefit of the heirs. In this view of the case the plaintiff's title is no better, for it is not pretended that he made title to the lands in his representative capacity. He acted as if he had the right in him, and in direct opposition to the law. It is well settled in this state and in all the books, that an administrator, or executor, must comply with the directions of the statute in the sale of real estate of his decedent. See statute of Mississippi on this subject. 2 Peters, 492.

But we deny that this deed could effect the interest and rights of the defendants in this cause, even if it had been properly made and were valid between the parties.

1st. The first section of the registry act of 1803, amended by the act of 1807, provides that any deed, or conveyance of lands then made, or to be made thereafter (to 1803) shall be ac-

knowledge by the grantor, or proved before a judge of the supreme court, or a justice of the peace, by one or more of the subscribing witnesses. See *Turner's Digest*, 76.

The 2d section provides that no such conveyance shall be admitted to record without such proof. *Ibid.* And the 7th section provides that every deed not so recorded and proved (within twelve months) after sealing and delivery, shall be void against subsequent purchasers for a valuable consideration, but shall be valid between the parties to the deed. *Ibid.* 77.

7. The court below erred in admitting the power of attorney, made by the Barclays in England, to Lyons, in 1827, and in refusing to permit the defendants to show that the certification or authentication was not according to the custom of London. If the authentication was informal or incorrect, the defendants certainly had a right to show it. Also the defendants' ancestor was in possession of the land in dispute at the time of this deed from Lyon's attorney to the plaintiff, and even if it conveyed the land in dispute by name, it would be void for maintenance on the same ground as the other.

8. The court below erred in allowing the maps from the surveyor-general's office to be read as evidence to the jury. It has not the requisites of a record; in objecting to its introduction the defendants showed that the custom of the office was not to record such plats, or surveys made by deputy-surveyors were not complete until approved by the surveyor-general; and the return of the deputy should show the authority under which he acted. That, until the survey is duly approved it may be amended, and it was the constant custom of Thomas Freeman to have errors in surveys corrected; that according to these rules the plat in question is improperly of record.

When a record is introduced as evidence, it must all be before the court, or it should not be received. If it be imperfect and does not comply with the requisitions of the law under which it is made, it should not be admitted. See *How. & Hutch.* 744, § 5; 748, § 11; 753, § 5; 769, § 11, as to the power and acts of the surveyor-general of lands.

9. The court below erred in giving all of the instructions asked by the plaintiffs, though some of them may be good law. In the first, the court instructs the jury that the plaintiff have proved title, &c., the very thing they were to find.

10. And the refusal to give the instructions asked by the defendants was equally erroneous. The law in regard to the principles contained in these instructions is clearly laid down in instructions already referred to, and need not be repeated.

Montgomery and Boyd, for defendant in error.

The certificate of confirmation in favor of Lacy Rumsey, was admissible under the statute of this state, which provides that copies of all the records of the land offices, in this state, duly authenticated, shall be read as evidence, subject to the same rules as in cases of records of court. How. & Hutch. 605, sec. 24.

The first objection which may be raised to this evidence, is, that it is not a record appertaining to the register's office. But this objection is fully met by the act of congress, regulating grants of land, &c. which, after providing for the granting certificates of confirmation, declares, that the certificate being recorded by the register of the land office, whose duty it shall be to record the same, shall be a relinquishment of the title of the United States. How. & Hutch. 745, sec. 6.

Another objection is, that the original was not produced nor accounted for. In addition to the position above taken, that the original would not be evidence, we contend that a fair construction of the act of the legislature makes a copy evidence, without accounting for the original. The language is, that the copies "shall be admitted" "without further or other proof," "in the same manner and with the same effect, and subject to the same rules and regulations as in cases of certified copies of records of any court of this state."

2. The next point, was an objection to the admissibility of the deed from Rumsey to Forman.

The first objection to its admissibility is, that it was not proved and recorded according to the act of the legislature. As

it was not recorded until after this suit was commenced, there may be some doubt of its admissibility, under the act of 1822;* but as that question is unimportant, we will not discuss it, but content ourselves with referring to the act of the legislature of 1803, "respecting conveyances;" the first section of which provides for the acknowledgment or proof of deeds, and concludes thus: "Then every deed or conveyance so acknowledged or proved, and certified, shall be received in evidence in any court of this territory, as if the same were then and there produced and proved." The proof was made before, and certified by a judge of the superior court of the territory, and the certificate contains all the requisites of the statute.

The next objection is, that the defendants were subsequent purchasers from the United States, for a valuable consideration without notice. It has been decided, that as between persons claiming under different grantors, priority of registry has no legal effect. Registry is constructive notice, only as between purchasers from one grantor. *Tyler v. Hammond*, 11 Pick. R. 193; *Tracy v. Jenks*, 15 Pick. R. 465.

3. When the power of attorney to Lyons was offered, an objection was taken that it was not properly authenticated.

The act of the legislature, under which this is offered as evidence, provides that all deeds and other instruments in writing, made between persons residing in a foreign kingdom, proved by the requisite number of witnesses, before the mayor of a city in which the parties shall dwell, certified by the mayor, in the manner such acts are usually authenticated by him, shall be evidence in all courts of record. How. & Hutch. 605.

The same rule is prescribed for the authentication of deeds. Ib. 346.

Where an officer is authorized to give certificates, such certificates are evidence without further proof, because it is part of the laws of the land, which courts are bound to notice. Gilb. Ev. 22-26; Peake's Ev. 60, 61.

* A deed may be given in evidence, though it was acknowledged after suit brought. Paine's Cir. Court Rep. 549; 2 Peters's Dig. 200.

When the law appoints a person for any purpose, the law must trust him as far as he acts under authority. Bul. N. P. 229.

The statements in the certificate are *prima facie* evidence of the facts, when the deed is recorded by the proper officer. 13 Peters R. 21; 1 McLean R. 520.

From these authorities we conceive the doctrine that the court is bound, of its own knowledge, to determine whether the certificate of the mayor of London is in the manner such acts are usually authenticated; and that having been done by an officer appointed by the law for that purpose, the court must give him credit for having done his duty, and cannot at least hear parol evidence that his authentication is in proper form, and is fairly deduced.

4. Again, as it is admitted the plaintiff had possession under the deed, or otherwise, of the land authorized to be conveyed by the power, and in virtue of a deed made by the attorney therein constituted, a legal acknowledgment might be presumed. *Connelly v. Boucie*, 6 Har. & John. 141.

5. The next objection was as to the admissibility of a copy of the map of Jane Rumsey's survey, certified by V. Howard, surveyor-general. The first objection to it, was that it had not been approved by the surveyor-general, according to the usage of the office, and proof of the usage was offered, which was rejected by the court. To this objection we answer, that usage cannot alter the law, and the certificate conformed to the law making it evidence. The act of congress which provides for the surveying the lands in this country, adopts the regulations previously adopted for the surveying the lands of the United States in the North-Western Territory. Laws &c. relating to Public lands, 488, § 11, of act 1803, and the act regulating the survey of the land in the North-Western Territory, after directing the manner of surveying &c., prescribes that maps of such surveys shall be made and recorded in books to be kept for that purpose. Ib. 421.

Our own statute before recited, making copies of all papers appertaining to any of the land-offices in this state, evidence,

embraced the map in question, and it was therefore admissible on its face, and as the law does not require any other evidence of its having been approved by the surveyor-general, it was not competent for the court to annex that condition to its admissibility as evidence on proof of a custom adopted by the officer.

The law requires the principal surveyor to record surveys; these and other matters required to be recorded, must be read as conclusive evidence; and parol evidence cannot be received to invalidate them, unless fraud be shown. 4 Pet. 346.

6. As to the first instruction we conceive there can be no doubt. It appears from the testimony, that shortly after the confirmation of the Rumsey and Forman grants, that W. G. Forman, who was acting as executor of D. Forman, and who as executor, petitioned for the confirmation of the grant to E. Forman, became the purchaser of the title to Rumsey, and the title from him is complete, if all the evidence was properly admitted. And Reynolds had subsequently, and before suit brought, purchased the title of the heirs of D. Forman, therefore he was the legal holder of both grants, and was entitled to all the land granted by either. But admitting that the conveyance from W. G. Forman were not properly admitted, still we contend that Reynolds shew a clear title to the land in both grants. For when W. G. Forman acquired the title to the Rumsey grant, he was acting as executor of George D. Forman, and had prosecuted in that character the claim to the land under the grant to E. Forman. Now it is well settled that an executor cannot acquire a title adverse to the devisees, whose interest he represents, and consequently the outstanding title purchased by him enured to the benefit of the heirs of D. Forman, subject to a charge for the money paid by the executor for the purchase of it. 5 Johns. C. R. 398.

But it is admitted in the record that both grants embrace the same land, and therefore the first and second and tenth instructions, if erroneous, were innocent, and could not have affected the verdict.

7. The second instruction is sustained by the decision of this court in the case of *Nevitt v. Beaumont et al.*, not reported.

The fourth, fifth, sixth and seventh, are fully sustained by the decisions in *Martin v. King's heirs*, and *Newman v. Foster*.

8. There must be a real, substantial enclosure, an actual occupancy, a *possessio pedis*, which is definite, positive, and notorious to constitute an adverse possession, when that is the only defence, and is to countervail a legal title. 2 Johns. R. 230.

9. The ninth instruction is equally well sustained. When a boundary is ancient, reputation is admissible to establish it. 2 Litt. 159; 2 Marsh. 158; 3 Ib. 226. Boundaries may be proved by hearsay evidence. 6 Pet. 341; 4 Hawk. 116; 1 Ib. 45; 10 Johns. 377; 4 Day, 265; 4 Dev. 342; 6 Litt. 7.

The instructions moved for by defendant and refused by the court, are ingeniously drawn, and require critical examination. The term notorious possession is used to avoid the requisitions of the authorities, that the land must be enclosed by visible boundaries. Now a party may be in possession of land, and such possession may be notorious, although he has neither *possessio pedis* nor actual habitation, nor enclosure designating the extent to which the party claims. The terms notorious possession would be satisfied by the ordinary act of ownership, of going on the land and taking timber off it, &c., which does not constitute such an adverse possession as will avoid a deed for champerty. 8 Johns. R. 220.

10. The last instruction asked was clearly not law, as actual adverse possession would not avoid the deed for all the land claimed by the party in possession, but only to the extent of possession designated by actual boundaries enclosed.

11. But it appears clearly from the record, that both instructions were abstract points of law, as the record states that the proof was that the land in dispute was not enclosed, but that a part had been fenced and cultivated by the defendant, and those under whom he claimed, until 1832. The deed from D. Forman's heirs was not made until 1834, at which time it was not pretended that there was such adverse possession as is contemplated by the authorities.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This was an action of ejectment brought by the defendant in error against the plaintiff. The plaintiff below claimed title under two Spanish grants legally and fully executed; one to Jane Rumsey, for 2000 arpens of land, dated the 8th of October, 1787, and the other to Ezekiel Forman, professing to be for the same land granted to Jane Rumsey, bearing date the 1st of June, 1792, for 2000 arpens of land. The defendant below claimed title under a patent from the United States, issued in 1823. The defendants only claim title to part of the land conveyed by the Spanish grants; or at least the quantity in controversy is but about one hundred and eighty acres. A bill of exceptions was taken on the trial, on which errors are assigned, six in number.

First. It is said the court erred in admitting the paper purporting to be a certificate of confirmation by the Board of commissioners west of Pearl River, to Lacy Rumsey, for 2000 arpens of land. The certificate of confirmation is in due form, but the objection is, that it was but a copy, and no proof was made of the loss of the original. To this objection several answers may be given. It does not appear that there ever was an original, other than that which is spread upon the record of the proceedings of the commissioners. But the statute declares in express words that copies of the records appertaining and belonging to the land-offices of the United States established in this state, duly authenticated by the proper officer having charge of the said records, shall be admitted as evidence in suits depending in this state, in all cases where the originals or sworn copies could be admitted, without further or other proof of such record. How. and Hutch. Dig. 605, sec. 24. The register certified that the certificate of confirmation was truly copied from the records in his office. This certificate then, was properly admitted.

Secondly it is assigned as error that the court improperly admitted the release or quit-claim deed of Lacy Rumsey to William Gordon Forman, and the indorsements thereon, to be read to the jury. Several objections are made to this instrument. It is insisted that it was not authenticated in the proper manner to make it evidence. It was executed on the 8th of December,

1806, in the presence of two witnesses. On the 30th of November, 1807, it was proven before Thomas Rodney, a judge of the superior court of the Mississippi territory, by one of the subscribing witnesses. The law as it then stood authorized the proof or acknowledgment of deeds to be made or taken by a judge of the superior court, and further provided that every deed so acknowledged or proven and certified, should be received in evidence. A further provision entitled deeds so acknowledged or proven, to be admitted to record; and deeds not recorded within twelve calendar months were declared void as against a subsequent purchaser or mortgagee without notice, but the statute contains no other restriction as to recording. The certificate of the judge on this deed, conforms to the provisions of the statute, and of course the deed was free from objections on this ground. Toulman's Dig. 243. But this deed was not recorded until the 10th of March, 1841 and it is insisted that it was therefore void as against the defendant, who is a subsequent purchaser, without notice, from the United States. As between these parties no registration was necessary. The registry act only avoids a prior unregistered deed in favor of a subsequent grantee from the same grantor. But the registration is of no consequence as between parties who derive their titles from different sources. The mischief which the law was intended to prevent, cannot in such cases exist. When the statute declares that unregistered deeds shall be void as to subsequent purchasers and creditors without notice, it can only mean to prefer a purchaser who has taken a conveyance from the same person who executed the unregistered deed. But the title under the Spanish government was recorded in the proper office. This deed then was as valid without recording, as to this defendant, as it would have been with it. It is also insisted that this was a mere quit-claim or release, and therefore insufficient to pass an estate. This is an objection which applies to its legal effect, rather than to its competency, or admissibility. It is admitted that the words "remise, release, and quit-claim," used in the deed, may be sufficient to perfect a title in one having claim of title. As a link, then, in the chain of title, it was proper evi-

dence. Its legal effect may more properly be considered under another head. An instrument is not necessarily to be rejected because it does not amount to a sufficient title to pass the entire estate. If it constitute a constituent part of title, it must be admitted. Its effect may depend upon its connection with other instruments. It may be insufficient in itself, to prove enough, and still it may be competent proof, when applied in its proper connection.

Thirdly, that the court erred in admitting in evidence the paper purporting to be a power of attorney from T. B. Barclay, G. P. Barclay, and T. M. Barclay, to Robert Lyons, and the indorsements thereon; and in excluding the proof offered by the plaintiff in error to show that according to the custom of London, the acknowledgments, as certified thereon, were not in due form, or legal. It seems that two of the constituents who executed the power of attorney, resided in London, and the other in Liverpool. The power was executed in presence of witnesses, who proved the execution, by two of the Barclays, before the mayor of London. Thomas B. Barclay resided in Liverpool, and there signed the power of attorney in presence of witness; the proof as to his execution, was made before the mayor of Liverpool, by a subscribing witness. The certificate of the lord mayor of London, is made under the official seal and signature of the mayor, but it is said the certificate of the mayor of Liverpool is defective in this, that it is not subscribed by that officer, but by the town clerk. It bears however the impress of the corporate seal, and purports, by beginning with the name of the mayor, to be his official certificate. The affidavit subscribed by the witness bears also the signature of the mayor, who administered the oath; it is the separate certificate that the witness appeared and deposed to the truth of the matters contained in the affidavit, which was signed by the town clerk by order of the mayor, and sealed with the corporate seal. The corporate seal must be regarded as imparting the requisite authenticity, and as proof that its character is truly stated in the instrument itself. These certificates are not of themselves evidence, but made so by statute, which declares that where the parties or witnesses to a deed,

reside in a foreign kingdom, state, nation or colony, the acknowledgment or proof made before any court of law, or mayor or other chief magistrate of any city, borough or corporation, of such kingdom, state, nation or colony in which the said party or witnesses reside, certified by the said court, mayor, or chief magistrate, in the manner such acts are usually authenticated by them or him, shall be as good and effectual as if it had been made before, and certified by one of the judges of the supreme court of this state. This statute appoints such foreign officers as are therein designated, as certifying officers, and it adopts the foreign law or custom in regard to the form of the certificate. The certificate of the mayor of a foreign city, is *prima facie* evidence that the certificate itself is in due form, or in the usual form of authenticating such acts, but it is not conclusive. 3 Phil. Ev. 1249. The certificate of a state officer is not of itself conclusive evidence that it is in due form, but may be shown to be defective, and whether defective or not is a question of law, because the manner of certifying is regulated by a public law which the courts of the state are bound to notice. But the question whether the certificate of a foreign officer conforms to the foreign law or custom, is a question of fact, because the manner of certifying is regulated by the foreign law, of which our courts are not bound to take notice, but which must be proven as a question of fact. It is only when the certificates are made in the usual manner of certifying that they become evidence here; the certificate itself is *prima facie* evidence that it is in due form, but the party who objects to its admissibility, may rebut this presumption by showing that it is not in the usual or legal manner of certifying. The question is then, how, or by what evidence may the objecting party prove that the certificate is imperfect? If the mode of certifying be regulated by law, then an authenticated copy of the foreign law must be exhibited to the court, in order that it may instruct the jury what the law is. If such a copy cannot be procured, then inferior evidence may be resorted to. The general principle here prevails, that the best evidence which the nature of the thing admits of, must be produced. Story's Conf. of Laws, 2d ed. 527 — 529. By the

bill of exceptions it seems that the defendant in the court below offered to prove that the certificate of the mayor of London was not authenticated according to the usages of the city of London, but how, or by what proof the defendant offered to establish this fact, does not appear. We cannot say that the court erred in not permitting a party to offer proof of a particular fact, which can only be proved in a certain way, unless it also appears that the proof excluded was pertinent to establish the fact which the party desired to establish. It may be that parol proof was offered. This would not do, except in connection with the fact that the mayor of London is not governed by any law in making his certificates. We conclude then that the certificates were properly admitted, and that no error is shown to have occurred in excluding the proof offered to impeach them.

Fourthly, it is assigned as error, that the court admitted a paper purporting to be a plat and survey of the land contained in the certificate of confirmation, certified by Volney E. Howard as the surveyor-general of lands south of Tennessee. We have before shown that the certificates of the officers of the several land offices established in this state, are made evidence by the statute. This certificate is by the surveyor-general, and within the statute. One of the objections to this certificate is that the map or plat differs materially from the map of the same land in the register's office. By the act of congress it was made the duty of the surveyor of lands south of the state of Tennessee to cause a survey to be made of all private land claims, and also of all public lands, and to transmit to the register's office general and particular plats of all the lands surveyed. Act of congress of the 3d of March, 1803. This we must suppose was done. The map so transmitted to the register's office, cannot be better than that retained by the surveyor-general. The statute makes copies of both evidence, and if there be a difference, it cannot be reconciled by making one superior to the other. Mistakes in the maps can only be corrected by actual surveys. Another objection to this certificate is that it is without date, and hence it is said that it cannot be known that Howard was surveyor-general when the certificate was given. He certifies as surveyor-general,

and it is his official character which makes the certificate evidence. We must presume that all the certificate is true, until the contrary is shown.

Fifthly, it is said the court erred in giving the several instructions asked by the plaintiff's counsel. The charges given were ten in number, and we shall only notice such as may seem to require comment. The first charge given was that the plaintiff had shown a complete legal title which emanated from the Spanish government by two grants; one to Jane Rumsey, the other to Ezekial Forman, and if the land in controversy was embraced by either of the grants, the plaintiff was entitled to recover, unless the defendant held under a superior title. Under this charge we may properly notice several objections made to the plaintiff's title, in the arguments of counsel. It is insisted that the Spanish grant to Forman conveyed no title, because it recited that the same land had been previously granted to Jane Rumsey. As an abstract proposition, it is undoubtedly true that a grantor, who disposes of land by a valid operative deed, cannot subsequently dispose of the same land by a valid operative deed to a different person. There is nothing on which such a deed can operate, since the entire estate passed from the grantor by the first conveyance. But if the original conveyance were inherently defective, then of course the second would pass the estate. These two titles seem now to be centred in the same individual. They are not arrayed against each other, and we are not called on to say which was the superior grant. To the Rumsey grant, in its inception, there is no objection, and if the plaintiff can trace his title regularly back to that grant, it must be sufficient. The chain of title is complete with one exception, but that, it is insisted, is a defect which cannot be overcome. Lacy Rumsey conveyed by release, or quit-claim deed, to William Gordon Forman, on the 18th December, 1806. The board of commissioners had granted a certificate of confirmation to Lacy Rumsey, as the legal representative of Jane Rumsey, on the 23d of July, 1806, in virtue of the Spanish patent to Jane Rumsey. The plaintiff, through regular mesne conveyances, derives title from William Gordon Forman.

The defect in the chain of title is said to consist in this: that no estate passed by the release, or quit-claim deed, of Lacy Rumsey to William Gordon Forman. To sustain this position it is assumed that Forman was not in possession, and it is argued that a release can only confer title to one who is in possession. A release, it is true, does not pass the right to land, of which another person is in the actual visible possession claiming a right. 12 Mass. R. 339; 11 Ibid. 222. A release, however, may be used as a conveyance of the estate to one in possession; or as a mean of transferring or enlarging an estate by giving some new interest. "And so," says one author, "it doth sometimes perfect an estate that was imperfect and defeasible before, and enure by way of entry and feoffment." Sheppard's Touchstone, 320 *et seq.* So it is said lands, tenements, and hereditaments may be given and transferred by way of release. Ibid. 321. And it seems that any interest in the person to whom the release is made, either by possession, by deed or in law, in his own or another's right, will be a sufficient foundation for the release to stand upon. Ibid. 323. Even if he be tenant at will it seems to be sufficient. But we find, from high authority, that a vested interest, without an actual possession, will be sufficient to sustain a release. Cruise's Dig. title Lease & Release. In a country abounding in wild land, a deed or grant may be regarded as a constructive possession, which was the case in this country when these titles originated. If William G. Forman, at the date of Rumsey's release to him, had actual possession, the title passed to him by the release. Or if he had constructive possession by virtue of the grant to his testator, it would seem to be sufficient. We have said that in order to avoid the release, counsel had assumed the position that Forman was not in possession. In this remark we are justified by the record, which furnishes no proof of any such fact; and we may advert to the history of the title, for the purpose of showing that it even favors a presumption the other way. We have before us extracts from the proceedings of the board of commissioners, from which it seems, that in March, 1804, William G. Forman, as the executor of David Forman, presented his claim to be

confirmed in the title under the Spanish grant to Ezekiel Forman. The petition was before the board at various times, from March, 1804, up to 1806, when the certificate of confirmation issued. Forman produced to the board the original Spanish patent to Ezekiel Forman as the foundation of his claim, and also other title papers and evidence. All this transpired at Washington, in the immediate vicinity of the land. But in addition to this, we find Lacy Rumsey, as a citizen of Jefferson county, which is at some distance from the land, conveying by release to William G. Forman, on the 18th of December, 1806, shortly after the legal representatives of David Forman had been confirmed in their title. In addition to these facts, it appears that Salkeld and the Barclays had for many years a plantation in cultivation on part of the Rumsey and Forman grants, and that the plaintiff has been in possession ever since he received a conveyance, with this qualification, that part of the land was, and is still, uninclosed. If Salkeld had a plantation on the land, it was probably as early as 1811, which was long before the defendant's ancestor acquired title. Nor is there any proof of an adverse possession, until 1832, which was after the plaintiff had acquired title. At the time of the trial, the deed of release was thirty-five years old, an age sufficient to draw to its support the favorable presumptions of law. It was said by Chief Justice Marshall, that in favor of long possession, in favor of strong apparent equity, much may be presumed. 7 Wheat. 546. In the case of *Jackson v. Lamb*, 7 Cow. 431, it was decided that a mutilated lease, in connection with proof of long possession, might be regarded as sufficient to justify the presumption that a release had been executed, as the lease seemed to have been drawn with a view to a conveyance by release. It is not uncommon, from proof of long possession, to presume that the possession was held under a deed. *Jackson v. Lunn*, 3 Johns. Cases, 109; 2 Notes to Phil. Ev. 364, *et seq.* So on proof of long possession, and all other things regularly made out, the title shall not fail for a single defective item. *Ibid.* It is true that where length of possession is relied on as furnishing a presumption of title, it must be established by unequivocal

proof. But such strictness cannot be requisite when a deed is proven which is to rest upon possession. The principle is, that proof of one ingredient of title will draw to it another. Here the release is well proven, and lacks nothing but proof of possession, or of a lease at the time it was executed to support it. This defect is supplied by a presumption, based upon the possession of the release, as far back as there is any evidence of possession. It is not, moreover, contended that there was any adverse possession until 1823, and no actual possession until 1832, when the present plaintiff was in possession under his title. His title to the whole and possession of part, was possession of the whole. *Hammond v. Ridgely*, 5 Har. & John. 215, 264. But it would seem, from the cases referred to in 11 & 12 Mass. R. that in order to defeat a release, there should be proof of an actual adverse possession, under a claim of right. There is no such proof in this case. It is the case of one seeking to avoid a title by release, when the releasee was in possession long before the defendant acquired title, and who, for anything that appears to the contrary, was in possession when the release was made. If the validity of the release rested alone on presumption of possession, it might be a question proper for a jury. But it is fortified by the absence of all proof of an adverse possession, and by the additional consideration that the great objection to it in the court below, was as to its authenticity. By the bill of exceptions it seems that the plaintiff read the release and certificates thereon, "without any further proof, to the admission of which in evidence the defendant by his counsel objected." From this language we must understand that the objection was intended to apply only to the omission to introduce further proof of the execution of the instrument. The argument as to the effect of a release as a conveyance has been much pressed in this court, and we have endeavored to meet it by showing that the facts in the case were such as would have obviated the objection, even if it had been pressed to the court below. The remaining charges do not seem to us to require special comment.

For the defendant, the court was requested to charge the

jury that if the plaintiff took his conveyance when defendant held adversely under a patent, the deed was void. It is insisted that the court erred in refusing this charge, because a deed so taken would be void for champerty, at least to the extent of the land held adversely, and the case of *Levitt v. Poor*, 11 Mass. R. 549, is relied on. That was a contract clearly within the common law doctrine of champerty, and therefore void. We might declare a similar contract void for the same reason. Champerty is an offence at the common law, and no contract which contains 'within itself a violation of law can be valid. But it is to be noted that on this subject we are governed by the common law only. We have no such statute as that of the 32 of Hen. 8, ch. 9, which prohibited the sale or purchase of land, unless the vendor had received the profits thereof for one year next preceding the sale. In order, then, to avoid the contract, the common law offence of champerty must be complete, for it is because of the offence that the sale is void ; and if there be no offence, the sale is valid. Parties may act innocently in consequence of an entire ignorance of the adverse possession. For example, one who buys a section of land without knowing precisely the metes and bounds, if, when the lines are ascertained, it should turn out that part of the land is in possession of an adversary claimant, is not guilty of champerty. The common law has in view the prevention of a great mischief, and as the case put does not fall within the evil, the law does not apply ; especially in this country in which there is so much land uncultivated, and which is held only by constructive possession. It is not an uncommon thing for purchasers to contract for large quantities of land, without ever having seen it. If champerty is committed by innocently buying a tract of land, a small quantity of which is claimed by another, the offence is quite common. To constitute champerty it is necessary to prove something more than that part of the land was claimed by another. The purchaser should have some knowledge of the adverse claim. This seems to accord with the view that was taken of the subject in the case referred to. It seems that all the land in dispute was in forest when the plaintiff purchased ; and there is

no proof that he knew anything of the defendant's claim. There is then no ground for holding the deed void for any part of the land conveyed.

In conclusion we may remark that both titles seem to be perfect, and that this is one of those cases of conflict of boundary which has originated out of the imperfect manner in which the original surveys of the country were made. But the bill of exceptions does not present the question of boundary in such a manner as to enable us to perceive where the difficulty lies. If a survey was made under an order of court, it is not brought up. The efforts of the defendant's counsel seem to have been directed against the plaintiff's title, rather than against his boundary.

The judgment must be affirmed.

**THE PRESIDENT, DIRECTORS AND COMPANY OF THE PLANTERS BANK
OF THE STATE OF MISSISSIPPI vs. THE STATE OF MISSISSIPPI.**

The failure of a bank to redeem in specie the notes which it has put into circulation, is a cause of forfeiture of its charter; when it suspends specie payments, it ceases to discharge the obligation imposed upon it by its creation and to answer the ends for which it was instituted; and unless there be some express exemption extended to it, for such failure, the state may resume its grant.

It seems that banks are not exempt from the rules of the common law in regard to corporations and the application of the law of *quo warranto* to them for forfeiture of charter; but are subject to them, at least so far as to have a judgment of forfeiture entered against them for a failure to pay specie on their notes.

The decision in the case of the *Planters Bank v. The State*, 6 S. & M. 628, cited and confirmed.

On appeal from the circuit court of Adams county; Hon. C. C. Cage, judge.

This was an information, in the nature of a *quo warranto*, under the act of 26th July, 1843, chapter 3.* The affidavit, on which the information was filed, contained three charges. 1st, the bank "had not paid specie for its notes for the last two years." 2d, that the bank was "then in a state of suspension." 3d, that "the stockholders of said bank did not, at the time they respectively subscribed for stock in said bank, pay for their said stock in gold, silver, nor the notes of the Bank of the State of Mississippi, or any of its branches, to wit, one fourth at the time of subscribing, one fourth in sixty days thereafter, and the

* For the substance of the act 1843, see the case of *Commercial Bank of Manchester v. The State*, 4 S. & M. 439-442; and *Commercial Bank of Natchez v. The State*, 6 S. & M. 601-603.

remaining two fourths six months after the said bank went into operation."

This affidavit was filed in the office of the clerk of the circuit court of Adams county, on the 7th December, 1843; and accompanying it, the district clerk filed an information charging generally, that the bank "had used and was still using, for the space of two years last past and upwards, without any warrant, grant or charter the following liberties, privileges and franchises, to wit, that of being or becoming proprietors of a bank," &c.

An injunction was issued by the clerk of the circuit court, upon this information, on the 29th December, 1843. It was directed to the bank and its counsellors, attorneys and agents. It "strictly enjoins them, the said president, directors and company, under a penalty of sixty thousand dollars, that they absolutely restrain all persons from the collection of any demands claimed by the said bank, person or persons, or assignees, or corporations, and all their officers and agents, or other person or persons, until the said information be finally tried and determined." The injunction was served on the president and cashier of the bank.

At the May term, 1844, of the court, the defendants moved to dissolve the injunction on the following grounds: 1st, Because the writ is not issued and returned according to any law. 2d, Said process is void on its face. 3d, There is no lawful affidavit, or information, or *quo warranto* filed in this case. 4th, That there is no law now in force in this state warranting said injunction. The court overruled the motion, and the defendants filed a bill of exceptions which exhibits all the proof offered on the trial of the motion, which was as follows. The defendants read the writ of injunction with the returns as before set forth. Then the agreement of the counsel, on both sides, was read, showing that the governor made a request, under the act of the 23d February last, upon the Planters Bank, to *appoint a commissioner* and make a *surrender under that act*, which request has not been complied with. The first suspension of specie payments by the bank was on the 4th May, 1837, and continued till 28th December, 1838; second suspension, on notes over ten

dollars, 5th March, 1840; and on all notes, 1st October, 1840. The state sold all her \$2,000,000 stock in said bank to the Mississippi Railroad Company, on the 6th March, 1840, after the said bank had accepted the transfer act of 15th February, 1839. It was admitted that the amount of money enjoined by said injunction, greatly exceeded \$500. This was all the evidence on the motion.

At the same term of court, June, 1844, the defendants filed their plea to the information, setting forth the various acts of the legislature, incorporating them, and claiming to exercise banking privileges, and all other rights and immunities granted by said acts.

To this plea the state filed five distinct replications, the substance of which is as follows :

1st Replication. That after the bank had entered into the business of banking, under said acts of incorporation, to wit, on the 1st January, 1842, large amounts of the bills, notes, and evidences of debt of said bank, had been put into circulation by the defendants, and were, at the time of filing the information, in circulation, and that, while they were thus in circulation, to wit, on the 1st January, 1842, said defendants, by the fraud, neglect or mismanagement of them, or some or all of their officers or agents, became and still were, at the time of filing said information, wholly insolvent, and unable to redeem the said bills, notes, and evidences of debt, so in circulation, in specie, or other lawful money of the United States. Whereupon the said defendants, on that day, discontinued, ceased, and closed their banking operations, and from that time until the filing of the information, neglected to resume their banking operations, either by way of discount, or otherwise.

2d Replication. That after said defendants went into operation, under the acts of incorporation referred to, to wit, on the 8th June, 1843, large amounts of the notes, bills, and evidences of debt of said bank, had been put in circulation; and while they were in circulation, to wit, on that day, the defendants, by the fraud, neglect or mismanagement of them, or some or all of their officers or agents, became wholly insolvent, and

unable to redeem their said bills, notes, and other evidences of debt. Whereupon said defendants discontinued their banking operations, either by way of discount or otherwise; and on that day, 8th June, 1843, assigned and transferred so much of their property to trustees in trust for the payment of their debts, as to render themselves incapable of continuing their banking operations, according to the intent of the said statutes of incorporation.

3d Replication. That after the defendants had commenced operations, under said acts of incorporation, to wit, 1st January, 1842, large amounts of the bills, notes, and evidences of debt of said bank, had been put in circulation, and still were so, at the time of filing the information; and while they were so in circulation, on that day, the defendants, by the neglect and mismanagement of them, or of some or all of their officers or agents, became and still were, at that time, wholly insolvent, and unable to redeem said bills, notes, &c. so in circulation, in specie, or other lawful money of the United States.

4th Replication. That defendants, after their incorporation, wilfully or negligently, so transacted and managed their corporate affairs, that, on the 4th May, 1837, the amount of the notes emitted by said corporation, exceeded three times the amount of the stock actually paid in, including all moneys then on deposit in said bank.

5th Replication, recites the act passed 21st February, 1840, "requiring the several banks in this state to pay specie, and for other purposes," which enacted that, from and after the 1st January, 1841, all the banks and moneyed corporations in said state, were required to resume specie payments upon all their notes, &c. and other liabilities, of every description, then due. That large amounts of the notes, &c. &c. of the bank, had been put in circulation by said defendants, at and before the 1st March, 1841, the time when the act went into effect, and then were due and unpaid, and that the defendants did on said day, and at other times since, neglect and refuse, on demand being made at their counter, in their banking-house in the city of Natchez, in said county, in business hours, to redeem

in specie, the notes, &c. &c. issued by said defendants, and then due and payable.

The defendants filed rejoinders to the 1st, 2d, and 4th replications, as follows, to wit:

Rejoinder to 1st replication. That defendants did not, after their being incorporated, to wit, on the 1st January, 1842, or at any other time, fraudulently or negligently so transact and manage their affairs as to become wholly insolvent, nor otherwise become insolvent, and unable to redeem the said bills, notes, &c. &c., in circulation, in specie, or other lawful money of the United States, and therefore discontinue, cease, and close their banking operations, and neglect to resume the same by way of discount or otherwise.

Rejoinder to 2d replication, admits that on the day alleged, the 8th June, 1843, they had put in circulation, and then had out, large amounts of notes and other evidences of debt, but deny that then, or at any other time, by the fraud or mismanagement of themselves, or their agents or officers, they became wholly insolvent and unable to redeem their said bills, &c., nor did they therefore discontinue their banking operations by way of discount, or otherwise, nor did they then or at any other time assign and transfer so much of their property to trustees for the payment of their debts as to render themselves incapable of continuing their banking operations according to their charter.

Rejoinder to 4th replication, denies that on the day alleged, 4th May, 1837, or at any other time, they did so wilfully or negligently transact and manage their corporate affairs, as that the amount of notes emitted by said defendants, exceeded three times the amount of the stock actually paid in, including all money then on deposit.

To the third and fifth replication, the defendants demurred, by a general demurrer.

To the defendants' rejoinder to the first replication, the district attorney filed a special demurrer, assigning for cause: 1. It attempts to put in issue an immaterial question, to wit, whether they became insolvent by reason of the fraud and

neglect set forth; whereas it is immaterial whether the insolvency was occasioned by fraud or not.

2. Because it involves a negative pregnant, and in effect admits there was an insolvency, though not by fraud.

Issue, in fact, was taken upon the rejoinders to plaintiff's 2d and 4th replications.

At the May, term, 1845, the demurrers on behalf of defendants, to the 3d and 5th replications were overruled; and the plaintiff's demurrer to the defendants' rejoinder to the first replication was sustained, and leave was given the defendants to amend.

Thereupon, the defendants rejoined to the 3d replication, as follows:

Rejoinder to 3d replication. Deny that by the neglect and mismanagement of their officers or agents, or by any other means, they became and remain wholly insolvent, and unable to redeem their bills, &c. &c., in circulation, at the time, 1st January, 1842, and in the manner stated.

Afterwards, at the same term, the defendants declining to rejoin to the 5th replication, the court gave a judgment of forfeiture as follows:

"That the said defendants do not in any manner further intermeddle, with or concern themselves in or about the holding of or exercising the liberties, privileges and franchises granted by their said charter, &c. &c., but that said defendants be, and they are hereby prejudged and excluded from further holding or exercising the same. And it is further adjudged, that all the said liberties, privileges, and franchises heretofore granted them, as set forth in the plea, be seized by said State of Mississippi, and that all the property, books and assets, of said defendants be seized and delivered to the trustees, hereafter to be appointed by this court, and that said trustees have execution therefor."

The court then proceeded to appoint two trustees, "to take charge of the assets and books of said defendants, wheresoever they may be found, whether in their own possession, or in that of their officers, agents, trustees or attorneys; to sue for,

The Planters Bank of Mississippi v. The State.

and collect all debts due to defendants; to sell and dispose of all property belonging to said defendants, both real and personal, or held by others for their use at public auction, after giving twenty days notice of the time and place, of sale in some public newspaper, printed and published in said state. And the proceeds of the debts when collected, and of the property when sold, to apply as may be hereafter directed by law to the payment of the debts of said defendants.”

The trustees gave bonds, which were approved of by the court, and the defendants prayed for and obtained this appeal.

Montgomery and *Boyd*, for appellants.

The first error assigned was the refusal of the court to dissolve the injunction on motion. Four grounds are presented in support of this position.

1. The injunction was not issued or returned according to any law. It was a legislative and not a judicial writ in its inception; operating as a legislative mandate and having no connection with the judiciary or with judicial action, 21 Pick. 542. It was issued by no court or judge, returnable to no court or place, and based on the direct command of the legislature.

2. The injunction does not purport to restrain the defendants, but directs them to enjoin and restrain others. *Regina v. Derby*, 2 Salk. 436.

3. The affidavit was insufficient, not showing a *prima facie* case of forfeiture, without which no injunction could issue. The affidavit states three grounds of forfeiture. One ground is “that the stockholders did not pay their stock subscriptions according to the third section of the act of the 10th February, 1830.”

The answer to this is that there are two other methods of payment allowed by the charter, which are not negatived in the affidavit. Act 16th Dec. 1830, sec. 1; Act 5th Feb. 1833, sec. 6. The malfeasance or misfeasance of the stockholder, in not complying with his contract cannot work a forfeiture of charter. It must be some act of the bank. 1 Serg. & Rawle, 1—14; *Walker v. Deveraux*, 4 Paige, 229.

The other two points in the affidavit amount to no charge of

any act done or omitted by the bank, but only of a certain condition of her affairs. 1 Spear's Rep. 467; 9 Wend. 373; 23 Ib. 215, 595.

The mere non-payment of specie, without any allegation of any *voluntary, wilful or fraudulent* act, on the part of the bank, will not work a forfeiture. 23 Wend. 236, 584—586, 589—594; 1 Hopk. 316—661; 6 Cow. 211, 215, 216, 219; 2 Stew. 36; 1 Spear, 433.

It is no violation of any express provision of the charter, nor of any general law, and the act of 1836, p. 171, sec. 3, and the act of 1840, p. 15, sec. 8, 9, 10, impose peculiar penalties of a specific nature; and the last of said acts expressly saves the charter from forfeiture, and provides for an entirely different proceeding. 6. How. 674; 4 Pick. 460; Act 10th Feb. 1830, sec. 32; Act 9th Dec. 1831, sec. 6. Mere omissions of a general duty, or a naked charge of insolvency not sufficient. Act 10th Feb. 1830; Hopk. 355, sec. 6—16, 20, 22; 5 Cond. Rep. 587; A. & A. 661; and n. 3; 662, and n. 1.

The last point under this head, was that banking was not a franchise in this state prior to 1840, and no forfeiture of charter could accrue unless directed by the act of incorporation, or some general law. It is only the violation of a franchise that works a forfeiture. 4 T. R. 38; 6 East, 259; Finch's L. 164; A. & A. 3, 618; 3 Jac. L. Dict. 123; 1 Kyd, 15; 2 J. C. R. 377; 15 J. R. 379; Ib. 388. The state could only resume what she had granted, to wit, a franchise. 6 Cowen, 219; 9 Cranch, 51; 13 Peters's R. 519; 19 J. R. 473.

The doctrine of trusts, and not of franchises and forfeitures, applies to such corporations as existed prior to 1840, in this state. 6 Cowen, 392; 3 Mason, 311; 1 Kyd on Corp. 273; 8 Peters, 286; 16 Mass. 271; Cases in Chan. 204; 1 S. & M. Ch. Rep. 260—262, 282.

These corporate trustees are subject to the general laws and principles applicable to trustees, and also to the special terms of their contract, and to no other. Secondly, no act of theirs can defeat the interest of the *cestui que trust*, which would not have the same effect in case of an ordinary trustee. Thirdly,

whether their trust character remains till the charter expires, or is taken away or destroyed sooner, the trust remains good, and survives with all its incidents for the benefit of the *cestui que trust*. 2 Mod. 52; 4 Ib. 58; 2 Bac. Abr. 482, last ed.; 3 Co. 75 a; 7 Paige, 294; 15 Mass. 622.

It is next insisted, that this bank has been excepted by express legislation from the common law rule as to forfeitures, &c. Act 1839, p. 61; Act 1837, pp. 175, 365; Act 1838, p. 176; Act 1840, p. 16, sect. 9; Act 1836, p. 171, sect. 3; 9 Wend. 351; 23 Ib. 218; 2 McMullen, 452; 9 Ohio, 208.

The state was a stockholder, owning half the stock of the bank, and had legal knowledge of its condition, through her directors. Act 10th Feb. 1830, sect. 12, 28. She sold this stock (say \$2,000,000) on the 4th March, 1840, and on the next day, the suspension, as alleged, took place; and this proceeding would enforce the forfeiture against the purchaser of that stock, can this be the law? 9 Wheat. 907; 3 McCord, 377; 1 Hawk. 36.

The charter authorized the bank to issue notes to three times the amount of capital stock paid in, and all deposits. This negatives the idea of a forfeiture for suspension. 3 Cruise's Dig. 102; Com. Dig. Franchise C. 3; Act 10th Feb. 1830, sect. 22, 17, 23; Act 2d March, 1833, sect. 1.

The suspension, as alleged, without fraud and in violation of no express law, is not of sufficient duration to warrant the presumption of a surrender. *Rex v. Jordan*, Cas. temp. Hardwick, 255; A. & A. 663; 2 Stuart, 30; 6 Cow. 211, 219; 19 Johns. R. 456, 474; 1 P. Williams, 207, per Powel, J.; 24 Pick. 51; 2 Burr. 1870; 6 Paige, 497.

The act of 23d February, 1844, repeals, by implication, the act of July, 1843, under which these proceedings were instituted.

They are absolutely inconsistent, and cannot both be enforced, so election is left to the state, because it is placed by the act in the power of the bank to accede to the last law, which would defeat such election.

The second act shows an entire change of policy, and an intention to save the assets from the effects of forfeiture, for the benefit of creditors. 3 Wend. 600; 13 Ohio, 270.

These proceedings were in progress when the act of 1844 was passed, and this negatives the idea of an election by the state being intended.

The involuntary, or compulsory proceedings, under the act of 1844, are positively ordered by that act, if the bank does not voluntarily surrender.

If the bank surrendered, the state released her from the penalties of the act of 1843; and if she did not surrender, then the act of 1844 was to be put in force, and not the act of 1843. And this release, being the result of law, cannot be made to operate in any different way than if it had not been expressed in the law.

The state, if an election was reserved to her, has elected to proceed under the act of 1844, by having made the demand, through her governor, under that law.

If the act of 1843 is not repealed, still the injunction is void. It does not connect itself with either the right or remedy provided for by that act, nor in any way affect the right, or promote the remedy, as it regards the state, or the debtors and creditors of the bank. 4 S. & M. 439, et seq.; 15 Johns. R. 380, et seq. It stands by itself, and whichever way the suit is decided, its fate is the same.

Again, the injunction is void, as it interdicts the exercise of a particular power, without any abuse of that power being shown. 4 D. & R. 139; A. & A. 560; 2 B. & C. 596. And this cannot be done until after forfeiture ascertained. The charter is a continuing power until actually resumed, and always warrants the proper exercise of all its provisions. Hopkins, 354, 598. The previous decision of this court, reported 4 S. & M. 482—519, is not in conflict with these views. No two of the judges concurred in sustaining the validity of the injunction.

The points made upon the pleadings were these. The demurrer to the rejoinder to the first replication was improperly sustained. Whether the insolvency alleged in that replication was the result of fraud, was certainly a very material issue, and is so recognized by numerous authorities. 23 Wend. 584—586, 589—594.

The authorities relied on from 6 Cowen, 215, &c. misled the pleader. The statute in New York rendered the question of fraud wholly immaterial. 6 Cowen, 212, &c.; 23 Wend. 221, 234, 252, 584; 9 Ibid. 223, 373; A. & A. 662; 19 Johns. R. 456.

But the rejoinder was general; and not, as supposed by the demurrant, a special denial of a fraudulent insolvency. Of course there was no foundation for the demurrer.

The next error was the overruling of the defendant's demurrer to the third replication. This replication avers in effect, an inability to pay specie on a given day. It is not a suspension by the order of the bank, or a total refusal, but a mere inability, or insolvency, at a given day. This never was a ground of forfeiture. 1 Hopkins, 354; 23 Wend. 584; 2 Stuart, 37; 1 Spear, 433, per King and Butler, justices; 15 Pick. 351; 6 Gill. & Johns. 205; 7 J. C. R. 224.

The last error assigned was the overruling the demurrer to the 5th replication. This replication claimed a forfeiture because the bank had failed to comply with the provisions of the act of 21st February, 1840, requiring a resumption of specie payments.

The following points were made in this part of the case.

1. The act is inoperative and void if intended to make any new causes of forfeiture, and was never accepted by the bank. 12 Conn. R. 550; 3 Story's Com.; 2 Stuart, 30; 16 Mass. 259.

2. If no new cause of forfeiture was created by the act, then the mere allegation of a refusal to pay specie on a particular day, without any further allegation, amounts to no cause of forfeiture. It is not as strong as the case of a mere suspension, which has been already considered. 23 Wend. 541, 588.

3. The act itself provides for a liquidation, and not a forfeiture. 16 Mass. 259; 13 Ohio, 270; 3 Wend. 600; 6 How. 674.

4. The act provides its own penalty, and not a forfeiture.

5. The act was repealed by the act of 1843, under which these proceedings were instituted, and that act was repealed, as we have shown, by the act of 1844.

6. This act was a mere general law, and non-compliance with

it would only subject a bank to its own provisions, and not to a forfeiture.

7. The resumption, required by the act, was of notes then due, 1st January, 1841. The notes named in the replication are stated to have been issued after that date. The notes due on the 1st March, and since, may or may not have been issued at or prior to 1st January, 1841. The demurrer ought to have been sustained.

Freeman, attorney-general for the state, cited the following authorities: 6 Cow. 219; 1 Spear, 491; *Ib.* 485; 23 Wend. 236, Cowen's opinion; 1 Spear, 466; *Colder v. W. C. Bull*, 3 Dallas, 391; *Van Horne's Lessee v. Dorrance*, 2 Dallas, 304; *Call v. Hagar*, 8 Mass. 430; *Ib.* 472; Stat. of Mass. 1812, c. 140; *Brown v. Penobscot Bank*, 8 Mass. 445; *Vose v. Grant*, 15 Mass. 505; Stat. of Mass. 1812, c. 32; *Bank of Rodney v. State*, 4 S. & M. 439; Ang. & Ames, 2d ed. 639, and authorities cited; 9 Cow. 205; 18 Johns. 137, 138; 23 Wend. 206; 4 Mass. R. 58; 6 Cow. 218; *Ib.* 219; 23 Wend. 236; 1 Spear, 485 - 491.

Sanders and *Price* for the relators.

The fifth replication shows the passage of the act of 21st of Feb. 1840, entitled an act requiring the several banks in this state to pay specie and for other purposes, which required, from and after the 1st day of January, 1841, all the banks, &c. to resume specie payments upon all their notes, bills, &c. then due, and avers that after its passage, to wit, on the 1st day of March, 1841, large amounts of the bills, notes, &c. of said president, &c. had been at and before that time put into circulation by them, and then remained due and unpaid, and they the said president, &c. did on said 1st of March, 1841, and at divers other times, since that time, neglect and refuse, on demand being made at their counter, in their banking house, in the city of Natchez, during business hours, &c. to redeem said bills, notes, &c. then due, in specie.

We have no doubt about the correctness of the decision, as

well upon general principles as upon authorities. Blackstone defines this writ as follows: "A writ of *quo warranto* is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right. It lies also in case of non user or long neglect of a franchise, or *misuser or abuse of it*; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having *forfeited it* by neglect or *abuse*." 3 Black. Comm. 262, title *Quo warranto*, and authorities there cited.

I have ever regarded, and yet do, all acts incorporating banking companies in the several states as well by congress, as in violation of the federal constitution, which prohibits the states from "coining money," "emitting bills of credit," "making anything but gold and silver coin a tender in payment of debts," and which does not give any such power to congress, and in violation of that section of our state constitution, which declares "That all freemen, when they form a social compact, *are equal in rights*; and that no man, or set of men, are entitled to *exclusive*, separate public emoluments or privileges from the community, but in consideration of public services." But the courts of our country have ever yielded to the misguided legislation on this subject, and what was intended to be prohibited by the framers of our early constitutions, has been construed otherwise by the courts, until they have obtained such toleration, that they can only be reached by the majesty of the people, and in all legal proceedings must be now regarded as constitutionally created.

If then these corporations are constitutionally created, the sovereign power of the state has but imparted to the corporators, for a specified time, a portion of its sovereignty, to do and perform certain specified acts, retaining the inherent right of resuming that sovereignty whenever they shall fail to conform to the grant, or misuse it.

Mr. Justice Clayton, in the case of the *Commercial Bank of Rodney*, speaking of incorporations, says, "that charters are always granted upon condition, either express or implied."

"There are always implied conditions in every charter, if not express, that the corporation shall perform certain trusts, and discharge certain duties, and upon breach of these conditions, the government may resume the franchise." He quotes approvingly, *Tenet v. Taylor*, 9 Cr. where the rule is thus stated: "A private corporation, created by the legislature, may lose its franchise by *misuser* or *nonuser* of them, and they may be resumed by the government, under a judicial judgment upon *quo warranto*, to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation." He then remarks: "This principle has been recognized and enforced in many of the states of our union, and its justice and propriety settled beyond doubt. Massachusetts, New York, New Jersey, Maryland, Virginia, South Carolina, Ohio, Indiana and Arkansas, have all acted upon it." And quotes authorities, which are referred to.

The chief justice, in the same case, in his opinion says: "It is a right which belongs to her in her sovereign capacity. Every charter is granted by the exercise of the high functions of government, and contains a portion of the power of government within it. Any abuse entitles the state to reclaim the power, and if no remedy existed at the time of making the grant, it is competent for her to provide one. Other checks out of the way, it was competent to direct proceedings by bill, accompanied by an injunction to stay the proceedings of the corporation. By adopting the information, other ancillary remedies are not necessarily excluded. It was an implied condition in the contract, that the state might withdraw the franchise for a forfeiture. If it may be withdrawn, may the abuse not be checked until it is withdrawn? But it may be placed on higher ground. The state being the only power that can control the abuse of authority by corporations, is bound to protect the public from the influences of these abuses, whenever they may occur." 4 S. & M. 512.

By the demurrer to these replications, the averments therein are taken as true; the bank had become wholly insolvent and

unable to redeem their notes, &c. and had refused to redeem, as required by the act of 1840. These acts are, by their terms, *misusers* of their franchise, and a failure "to perform certain trusts and discharge certain duties," for which "the government may resume the franchise."

In the case of the *People v. Hudson Bank*, 6 Cowen, 217, it is held, that "suffering an act to be done, which destroys the end and object for which a corporation was instituted, is equivalent to a surrender of its corporate rights; as where an incorporated bank becomes insolvent."

Mr. Justice CLAYTON delivered the opinion of the court.

This is an information, in the nature of a *quo warranto*, filed against the Planters Bank, in the circuit court of Adams county.

The fifth replication to the plea of the defendants, in substance, recites the act of the 21st of February, 1840, requiring the several banks in this state to pay specie and for other purposes, which enacted, that from and after the 1st of January, 1841, all the banks and moneyed corporations in the state were required to resume specie payments upon all their notes, and other liabilities of every description then due. That large amounts of the notes of the bank had been put in circulation by said defendants before the 1st of March, 1841, the time when said act went into operation, and were then due and unpaid, and that said defendants did on said day, and at other times since, neglect and refuse, on demand being made at their counter, in the city of Natchez, in business hours, to redeem in specie the notes issued by said defendants, and then due and payable.

To this replication the defendants filed a demurrer, which was overruled by the court, and upon their refusal to file a rejoinder, a final judgment was given against them.

The opinion in the case of the *Commercial Bank of Natchez v. The State*,* settles the principles which govern this. The

* *Commercial Bank of Natchez v. The State*, 6 S. & M. 599.

The Planters Bank of Mississippi v. The State.

act of 1840, above referred to, is merely affirmatory of the common law. See *State of Ohio v. Commercial Bank Cincinnati*, 10 Ohio, 539. It creates no new causes of forfeiture; for, at common law, the failure to comply with a material condition of the charter, either express or implied, was a ground of forfeiture. Of this character is the failure of a bank to redeem in specie the notes which it has put into circulation. When it fails to do this, it ceases to discharge the obligation imposed upon it by its creation, and to answer the ends for which it was instituted, and unless there be some express exemption extended to it for such failure, the state may resume its grant. A very ingenious argument of counsel, in this cause, in which it is attempted to prove that banks are but trustees, and not subject to the rules of the common law, in regard to corporations, cannot, in our view, be sustained, at any rate to the extent to which it is here pushed.

We have reviewed the decision* of this court, in regard to the effect of the two acts of 1843 and 1844, and we can see no reason to change the opinion then delivered.

The judgment is affirmed.

* *Planters Bank v. The State*, 6 S. & M. 628.

NOVEMBER TERM, 1846.

JOHN KNIGHT vs. HENRY D. YARBOROUGH et al.

A bill of interpleader admits the indebtedness of the complainant therein ; and when one of the parties defendant withdraws all claim to the fund, a decree in favor of the other is a matter of course.

Where a person, on being authorized so to do, collected a debt of another, in notes of a bank then current at par, with instructions to pay the proceeds (after satisfying a debt due to himself,) over to a third person ; and that third person directed a special appropriation of the money to another party, who was willing to take the notes at par, which appropriation the holder of the notes refused to make ; *held*, that his refusal to permit the appropriation made the subsequent holding of the notes at his own risk ; and that he would be liable to the person entitled to the money for the full amount thereof in specie, though the notes received by him had greatly depreciated.

On appeal from the superior court of chancery ; Hon. Robert H. Buckner, chancellor:

John Knight states in his bill, that before the 18th July, 1840, he received \$406¹⁰/₁₀₀ in post notes of the Union Bank, for the use of Thomas Organ, and with his knowledge and consent ; that on that day he was garnisheed by Mark Izod, a creditor of Organ, to which he answered on the 9th June, and expressed his willingness to bring the post notes into the circuit court, and did actually deposit them with the clerk ; that on the 19th May, 1840, he had been served with a notice by Henry D. Yarborough, that he claimed the money, a copy of which notice is exhibited with the bill ; that Yarborough subsequently sued him to recover this money ; that he has always been ready and willing to pay the post notes to whoever was entitled, and desirous only to be protected from the conflicting claims of Organ's cred-

itors, who are prayed to be made defendants, and required to interplead and settle their rights.

The answer of Izod states that, as sheriff of Adams county, he collected a judgment of *Knight v. Organ* from Yarborough, as security on forthcoming bond for \$420 $\frac{7}{100}$, which was paid over to Knight at the spring term, 1839; that when Yarborough paid the money, he informed respondent that Knight had a judgment against one Hosea, on a note which was held as collateral for said debt, and that Organ had agreed that Yarborough should receive the money when collected of Hosea; that afterwards an execution came to his hands in the case of *Knight v. Hosea*, on which he collected \$542 $\frac{19}{100}$ in Union post notes, and paid the same to Knight on the 11th Feb. 1840. Before he did so, however, Yarborough requested him to apply it to other executions in his hands against Organ, on which Yarborough was bound as security. He applied to Knight for his consent, and stated what Yarborough had said about his right to the money; but Knight refused his consent to such application of the money, and threatened him with motion; that from information he had received, he believed the money belonged either to Yarborough or Organ, and that he took out process of garnishment against Knight, as stated in the bill; and that he was always satisfied the money justly belonged to Yarborough.

The answer of Yarborough states that Organ owed Knight \$323 $\frac{2}{100}$, and that Knight held the note of Hosea for \$467, as collateral security, and obtained a judgment on the first note, which was honored by Yarborough and paid; that it was agreed by Organ that he, Yarborough, should have the benefit of the collateral note held by Knight; that shortly after the payment of the judgment against Organ, he called on Knight and showed him the sheriff's receipt, and requested Knight to deliver to him the note of Hosea, held as collateral, which he refused to do, but recovered judgment against Hosea and collected the money on the 18th Feb. 1840; that the \$806 $\frac{16}{100}$, admitted by Knight to have been received for the use of Organ, is part of the sum of \$542 $\frac{19}{100}$, collected of Hosea; that on the 19th March, 1840, he

served Knight with the notice which is made an exhibit with the bill; admits the institution of suit against Knight, and denies that he authorized the receipt of Union post notes.

A bill filed by Yarborough against Knight was treated as a cross bill in the case; it recites the bill of interpleader, states the recovery of judgment by Knight against Organ, and the delivery by Organ of Hosea's note as collateral security, and the recovery of judgment on that note also; states the collection of the money by Knight on both judgments; that Organ promised him he would be safe in going on the bond in the case of Knight against him, because Knight held the collateral note, and that Organ authorized him to get the receipt given by Knight, from his attorney, Covington Rawlings, which was afterwards delivered by said Rawlings to him, and is made an exhibit.

This receipt authorizes Knight to retain out of the note of Hosea *his claims* against Organ; not only the note paid by Yarborough, but his account of \$135. He states that he was induced, by the promises of Organ, to go on the forthcoming bond, and that he informed Knight of the agreement between Organ and himself before the payment of the forthcoming bond. That before the payment of the money, Knight promised him an order for the money in the case of Hosea so soon as it should be paid; but after the payment he refused so to do without retaining about \$150, which he asserted was still due to him from Organ on account. That previous to the payment of the money on the forthcoming bond, Organ had removed from this state;—he had no knowledge that Organ ever authorized the receipt of Union post notes; he himself never authorized Knight to receive them.

The answer of Knight to the cross bill, among other things admits the receipt of Hosea's note, as collateral security, the proceeds of which are to be applied not to the note of Organ alone, but generally to the payment of his claims against Organ, or to be returned to him; he denies that he ever promised Yarborough to pay him the amount of the judgment, or any part of it, nor did he ever promise in any way to give him the benefit of an order for it; states that Yarborough never

exhibited to him any evidence of authority from Organ, to receive said money, or any part of it, and that he never knew that he had his receipt (if such was the fact) before the exhibition of it in the bill; that he never stated or intimated to him before the filing of said bill, that he had said receipt, and that he never believed or had any sufficient evidence to believe that Y. was properly authorized by Organ to receive the money; states that in addition to the note, Organ owed him a balance of account of about \$135, which he was fully authorized by the terms of his receipt to retain out of the judgment against Hosea, and repeats that he has always been ready and anxious to pay the balance to Organ or any other person, lawfully authorized by him, so that he could be safe from the conflicting claims of creditors. That Organ expressly authorized the receipt of the post notes, and although the notes on hand may not be the identical notes, he always kept that amount of them specially for Organ, until he deposited them with the clerk. That the sum of what passed between complainant and himself, is this; complainant frequently told him that Organ was largely indebted to him, and that he should lose by him, and manifested anxiety to get respondent's consent to pay him any balance that might remain in his hands, after paying himself; and was very willing to receive Union post notes, to which respondent replied expressing his willingness to pay to Organ or his authorized agent, and advised complainant to garnishee him at once, which he said he could not do, because he was not a judgment creditor. But complainant never claimed any legal right to demand the money, or produced any evidence of such right; he denies that he was called upon by Izod for permission to pay the money to complainant. And states that he offered to pay the money to complainant if Izod would withdraw his garnishment, &c. and Izod's refusal.

The testimony of the defendant Izod was taken; who, in addition to the facts stated in his answer and admitted in the pleadings, proved that Yarborough paid the debt to him, for which Knight had the judgment against Organ and Yarborough, which he paid over to Knight, as well as the \$542.16, which

Knight v. Yarborough et al.

he had received on the judgment in favor of Knight against Hosea, which last judgment he collected and paid over to Knight in Union money, then current. That when Knight came to get the money collected on the Hosea judgment, he told Knight that he intended to apply it to the satisfaction of an execution in his hands against Yarborough, and upon which Knight threatened to move against him as sheriff, if he did not pay the money, upon which he paid it to him; that at that time and before he paid Knight the money he told Knight of the nature of Yarborough's claim on the money, and his assignment from Organ, and his having paid the judgment of Knight against Organ and Yarborough.

On cross-examination, he stated that on the same day he paid the money on the Hosea debt to Knight he took out his process of garnishment against Knight, as a debtor of Organ, Organ being a debtor of the witness. That though a party to the suit, he had no interest in it, and had abandoned his claim on garnishment.

On this state of pleading and proof, the chancellor dismissed Knight's bill of interpleader, and on the bill of Yarborough against Knight, decreed the latter to pay the former the full sum of \$542.16, with interest; from which decree Knight appealed.

R. M. Gaines, for appellant, contended,

1. That this was a proper case for a bill of interpleader, and cited 6 Johns. Ch. R. 445; 3 S. & M. 294, and authorities cited; 15 Vesey, 246.

2. That the decree against Knight should have been to pay Yarborough the Union Bank notes, less the \$135, due to himself.

J. T. McMurran, on the same side.

G. Winchester, for appellee, contended,

1. That the decree of the chancellor was right, on the merits. 1 Story's Eq. 83—85; Story's Eq. Pl. 240, § 297.

2. That the chancellor could not decree otherwise than a

Knight v. Yarborough et al.

payment in lawful money. 1 Story's Eq. 83, § 65; § 64—§ 74; Ib. 590, § 635; Ib. 592, § 637; Story's Eq. Pl. 240, § 297.

Mr. Justice CLAYTON delivered the opinion of the court.

The bill of interpleader necessarily admits the indebtedness of the complainant. The defendant Izod has dismissed his garnishment, and withdrawn his claim. Of course the complainant is bound to pay the other defendant, Yarborough. The only question is, as to the kind of funds for which he is responsible—whether he can pay in Union post-notes, or is bound for par funds. Knight alleges, that he was authorized to receive the Union post-notes, by Organ; but when the authority was given is not stated. At the time of the payment Organ had left the country, and had transferred the receipt of Knight for the claim, to Yarborough. It does not appear when he received notice of this transfer. Knight was authorized to collect the debt, for which the receipt was given, to pay his own claims, and pay the balance to Organ. Before the money was paid to him by Izod, he was informed that Yarborough claimed it. He refused to permit the sheriff Izod to retain it, and apply it to executions which he held against Organ and Yarborough, which Yarborough had directed to be done. He received five hundred and forty-two dollars, when, by his own showing, Organ only owed him one hundred and thirty-five ⁷⁰/₁₀₀ dollars. We think his refusal to permit the application of the money to the payment of the executions against Organ and Yarborough made the subsequent holding of the notes at his own risk. At that time there were no proceedings against him to restrain such payment, and the sheriff was willing to receive the notes at par. The evidence is, that they were then current at par.

The decree below was rendered against him for the whole amount received by him. This was erroneous. He was entitled to credit for the balance of account, which he shows Organ owed him.

The decree will be reversed, and the cause remanded for further proceedings, in accordance with this decision.

WILLIAM H. BENTON vs. J. B. CROWDER.

After judgment at law, equity cannot interpose to set it aside upon grounds which might have been used as a defence at law, unless it were obtained by fraud.

Where a separate suit was instituted against an indorser of a bill of exchange, and also a joint suit on the same bill against him and the other parties thereto ; and on the same day judgments are rendered on both cases, in the separate against him and the joint suit for him, where he plead ; *held*, that he could have no relief in equity though the proceedings at law were irregular, as the plaintiff had no right to sue the indorser separately ; yet the defendant should have appealed.

Where the maker and indorser are sued separately, and the maker give a forthcoming bond, it will not be a satisfaction of the judgment against the indorser ; nothing but an actual payment of the one, would be a satisfaction of the other judgment.

APPEAL, from the superior court of chancery ; Hon. Robert H. Buckner, judge.

The bill alleges, that on the 24th day of May, 1838, the defendant Crowder, recovered a judgment against the complainant Benton, in the circuit court of Warren county, for the sum of \$3265 ²/₁₀₀, besides costs. That a *fi. fa.* upon this judgment has been levied upon the land of complainant. That on the same day, the defendant recovered a judgment in the same court against Miles C. Folkes, Samuel Folkes, John Robb, and James Folkes, for 3360 ²/₁₀₀, besides costs. That these two suits, and the judgments therein, are based upon the same identical instrument of writing, and no other consideration. That in said last-mentioned suit the jury, upon the plea of the complainant, found a verdict for him, and judgment was accordingly pronounced by said court in his favor, and that complainant was thereby discharged from his indorsement upon the note. The bill further states that the complainant was only the accommodation indorser of S. and M. C. Folkes. That when the *fi. fa.*

Benton v. Crowder.

issued on the judgment last mentioned in said bill of complainant, the same was levied upon property of said S. and M. C. Folkes, and that they executed a forthcoming bond for the property levied on, with J. M. Green as surety.

The bill prayed for an injunction which was granted by a circuit judge, but afterwards dissolved on the face of the bill by the chancellor; when Benton appealed.

P. W. Tompkins, for appellant, contended,

1. That the act of 1837, which required all the parties to a note or bill to be sued in one action, when taken in connection with the decisions of the court, that the execution of a forthcoming bond by one party to a joint judgment was a satisfaction of the whole judgment, as well as to those who did not, as to those who did join in it, would so far change the rule of decision in the case of *McNutt v. Wilcox*, 3 How. 417, as to make the execution of a forthcoming bond by one of the parties to a note operate as a satisfaction of the judgment against the other parties, even though obtained in a separate suit.

2. That to give a contrary construction to the act of 1837 (How. & Hutch. 595, 596,) would be rewarding Crowder for his violation of law, and granting him advantages thereby, which if he had complied with the law he would have forfeited, and thus bestowing a premium upon him for his disobedience and contempt of the law.

J. S. Yerger, for appellee.

1. To make a *former* judgment operate in bar or estoppel, it must be upon the very same point, and the very same parties or their privies. What the point made in either case as a defence by the complainant was, the bill does not state. That the cases were not between the very same parties, the record exhibited with the complainant's bill clearly shew. Both were actions of assumpsit. Under the general issue in that action the defence now attempted to be made available as ground of equitable relief, could be given in evidence, or might be pleaded by way of estoppel. 1 Chit. Pl. 513; 3 Ib. 928, note (a.)

2. If the verdict and judgment were rendered against complainant *before* that in his favor, the latter furnishes no discharge. The first judgment may have been (and as he states no other must be taken to be) the ground upon which the verdict was found for him in the latter case. The verdict and judgment in the first case were competent evidence to go to the jury under the general issue, and their effect was to be decided by the jury under the instructions of the court. 1 Chit. Pl. 543; 2 Barn. & Alder. 668; 9 Eng. Com. Law. Rep. 437; 3 Chit. Pl. 928, note (a.)

3. If the verdict and judgment in favor of complainant were rendered *before* that which was rendered against him, they furnish no ground for the interposition of a court of equity. If the complainant wished it to operate as a bar, or to become conclusive, he should have pleaded it by way of estoppel. If he neglected to do this, and relied upon the use of it under the general issue, the jury were the judges of its effect, and having decided against him, leaves no ground for the interposition of a court of chancery. See the cases cited above, and 16 Johns. R. 136; 18 Ib. 352; 8 Wend. R. 1; 3 Cow. R. 125.

So that whether the judgment in favor of complainant was rendered *before* or *after* that which is sought to be enjoined, the law is with the defendant. The question being purely legal, and no single equity being set up in the bill against the judgment sought to be enjoined, a court of equity will follow the law, and permit the enforcement of the judgment.

4. The second ground assumed in the bill, does not entitle the complainant to relief in equity.

This honorable court has decided that the levy of an execution on property of the maker of a note, and the taking of a forthcoming bond which is forfeited, do not entitle the indorser to relief in equity, when the proceedings were in separate suits. Nothing but an *actual* payment will raise an equity in his favor. *McNutt v. Wilcox & Fearn*, 3 How. R. 417.

Mr. Justice CLAYTON delivered the opinion of the court.

This bill was filed by Benton, alleging that in 1838, a *sepa-*

rate suit was brought against him by Crowder, as the indorser of a bill of exchange, and judgment rendered upon it against him. That another was brought against him and the drawer and other indorsers of the same bill of exchange, and on the same day a verdict and judgment in that suit were rendered in his favor, and against the other defendants. That on this latter judgment a forthcoming bond was given and forfeited, which operates, as he alleges, a satisfaction not only of the judgment against those defendants, but of that against him. An injunction was prayed for and obtained. The chancellor dismissed the bill upon motion, for want of equity upon its face.

After a judgment at law, equity cannot interpose to set it aside, upon grounds which might have been used as a defence at law, unless it were obtained by fraud. *Thomas v. Phillips*, 4 S. & M. 358.

The cases of *McNutt v. Wilcox & Fearn*, 3 How. 417; and of *Kershaw v. The Merchants Bank of New York*, 7 Ib. 386, show that on the other ground no relief can be afforded him.

If one judgment had been actually paid, of course the other could not be enforced, but a satisfaction which is only *prima facie*, by the substitution of a new judgment on the bond for the original judgment, cannot be a discharge of a separate judgment.

The proceedings at law were clearly erroneous, as the plaintiff at law should have sued all the parties jointly. But courts of equity have no power to correct such errors in a court of law, such power pertains alone to an appellate tribunal.

Decree affirmed.

PARKINSON & SEVIER et al. vs. WALDRON, THOMAS & Co.

78 189
85 101

A motion to quash a forthcoming bond, after the return term, comes too late, and cannot be sustained.

But if, on a writ of error *coram nobis*, a motion be made to quash a forthcoming bond, after the return term, and the motion be considered merely as a mode of bringing up the merits of the case under the writ of error *coram nobis*, and not as an independent motion to quash the forthcoming bond, and upon investigation it should appear that the bond was absolutely void, the court might, perhaps, order the bond to be set aside as a nullity.

A forthcoming bond, for the delivery of "one lot of dry goods," and made payable to the plaintiffs, by their copartnership name, is not void, but at most only erroneous and voidable.

ERROR, from the circuit court of Claiborne county; Hon. George Coalter, judge.

From the record in this case, it appears that on the 6th day of June, 1838, in the circuit court of Claiborne county, Tunis A. Waldron, Frederick T. Thomas, Lude Reid, Charles T. Day, and Frederick T. Mygatt, copartners, under the name and style of Waldron, Thomas & Co. recovered a judgment against Richard Parkinson and George W. Sevier, copartners, under the name and style of Parkinson & Sevier, for the sum of \$1377 93. Upon which judgment an execution was issued, and levied "upon one lot of dry goods," and a forthcoming bond taken, with William T. Purnell as surety therein, payable to Waldron, Thomas & Co.; and on the 4th Monday of November, 1838, returned forfeited. At the November term, 1842, Purnell presented a petition to the circuit court of Claiborne county, praying for the allowance of a writ of error, *coram nobis*, to bring up the record and proceedings in said case, and that the court would quash said bond; and also the execution which was issued thereon, for the following errors, alleged to be apparent upon the face of said proceedings, to wit:

"1. The return upon the original *feri facias* does not describe the property levied upon, with any degree of certainty.

"2. The paper, purporting to be a forthcoming bond, is conditioned for the delivery of property which it would be impossible to identify.

"3. Said supposed bond is not executed in favor of the plaintiffs in the original judgment, but in favor of Thomas & Co."

The writ of error *coram nobis* was allowed, and at the same term, (November, 1842,) the forthcoming bond and the execution which issued thereon, were, upon motion of Purnell, ordered to be quashed. To reverse the judgment quashing said bond and execution, Waldron, Thomas & Co. are now prosecuting this writ of error.

H. T. Ellett, for plaintiffs in error.

That these bonds cannot be quashed on motion, or on writ of error *coram nobis*, after the return term, is well settled. Even where the execution and bond are not made part of the record, still, if it appears from the record, as it does in this case from the petition, motion and order thereon, that a bond was quashed after the return term, the court will reverse it. *Shields et al. v. Graves's Executors*, 6 How. 262.

It is submitted, therefore, that the judgment ought to be reversed.

Mr. Justice THACHER delivered the opinion of the court.

The record in this case shows that a writ of error *coram nobis*, was sued out to the circuit court of Claiborne county, upon an allegation of defects in a forthcoming bond, upon which an execution had issued. It also appears that, at the return term of this writ of error, a motion was made, and sustained, to quash the forthcoming bond, and the execution thereon. The forthcoming bond was forfeited at the November term, 1838, and the motion to quash the bond was made and sustained at the November term, 1842. By the repeated decisions of this court, the motion was made too late, and could have been sustained only at the return term of the forthcoming bond.

But if the motion in this case be considered merely as a mode of bringing up the merits of the case under the writ of error *coram nobis*, and not as an independent motion to quash the forthcoming bond, and upon investigation it should appear that the bond was absolutely void, the court below might, perhaps, in this mode of proceeding, have so declared it, and ordered it to be set aside as a nullity; but in case the bond were merely erroneous, and voidable only, as we are disposed at most to say of the forthcoming bond in this record, then the proceeding is unwarranted, and it was too late for the court to quash it. *Williams v. Crutcher*, 5 How. 71.

Judgment reversed.

JOSEPH ANDREWS et al. vs. THE PRESIDENT, DIRECTORS AND COMPANY OF THE PLANTERS BANK OF THE STATE OF MISSISSIPPI,

Where one of two partners subscribes the partnership name to a note as sureties for a third person, without the authority or consent of the other partners, the latter are not bound; and it lies upon the plaintiff to prove the consent or authority of the other partners; such consent or authority may be presumed from sufficient circumstances.

V. & A. were partners in trade; V. the active partner, A. in the habit of frequenting the store, but not managing the business. V. was in the habit of indorsing the firm name of V. & A., signing it as sureties for third persons, and notices of the coming due of such liabilities were often left at the store of V. & A.; but it was not proved that they were ever brought to the knowledge of A. except in one instance when he denied V.'s authority so to use the firm's name. *Held*, that the facts were not sufficient to uphold a verdict against A. on a note signed by V. & A. as sureties.

In error from the Yazoo circuit court; Hon. Morgan L. Fitch, judge.

The President, Directors and Company of the Planters Bank sued Joseph Andrews and James H. Vance, partners under the firm of Vance & Andrews, on a note signed by Vance & Andrews as joint makers with others. The note was made by James Warren as principal, and by Vance & Andrews, R. M. Wynn, and J. H. Lawrence as sureties. Andrews plead *non assumpsit*, under oath. A trial was had, and a verdict found against him. He moved for a new trial, which motion was overruled, and a bill of exceptions taken. From which it appeared, that the note sued on was signed in the partnership name of Vance & Andrews, but that it was signed in the handwriting of Vance, who was the active partner; that Andrews was a planter and lived three or four miles from the town, where the business was conducted. J. Hughes, the cashier of the bank, stated that during the partnership Andrews was frequently in town; and when in town was generally at the store of Vance & Andrews. That

Vance frequently signed notes as surety and indorser in bank, in the name of the firm; that the bank heard no objections from Andrews until the firm became insolvent; but that they did not know whether Andrews knew of Vance's signing the name of the firm as surety, before that time; that he then objected and said Vance had no authority to sign the name of the firm as surety. That notices to Vance & Andrews, as indorsers, were left at the store of Vance & Andrews, in town; whether Andrews ever saw them or knew of them he could not say. The note sued on had the word "security" opposite the name of Vance & Andrews.

This was all the evidence in the cause. No instructions were asked for by either party. On the refusal of the court to grant a new trial, the defendant brought the case to this court.

George S. Yerger, for plaintiff in error.

1. To my mind it is surprising the jury should have rendered a verdict against Andrews, on the foregoing testimony, and yet more surprising that the judge should have permitted the verdict to stand. It is not merely a verdict against evidence, but it is *literally a verdict without evidence*. For there is not the slightest evidence to show that "Vance," as partner, had authority to bind the firm as surety for third persons: and there is not a tittle of testimony to show that Andrews knew of his signing the name of the firm as surety. The evidence of Hughes is that Vance did so, and that notices were left at the store, but he also proves that Andrews was a planter, lived in the country, and he could not tell whether he knew of such signing or not; he says that Andrews, when shown the paper, denied at once the authority of Vance. In order to charge Andrews, it must be shown, by evidence, that he either expressly authorized it, or that he knew he did so, and assented to it. And the evidence of his knowledge and assent requires to be proved by clear and indisputable testimony.

2. It is settled beyond dispute, by many cases, that one partner cannot bind the firm by becoming security for third persons, without the assent of the other. *Foot v. Sabin*, 19 Johns. R.

154; *Wilson v. Williams*, 14 Wend. 146; *Williams v. Wolridge*, 3 Wend. 415; *Bank of Rochester v. Beman*, 7 Wend. 158.

The case of *Foot v. Sabin*, 19 Johns. R. is precisely like this; there the word security was written opposite the name of the firm, and thereby indicated to all persons it was signed as surety.

3. The above cases also all decide that the holder of the note must prove the assent or agreement of the other partners affirmatively and clearly, in order to recover.

4. It is admitted, that this assent may be proved either expressly or it may be implied from facts and circumstances. But it is settled that the *evidence* must be *strong* and *satisfactory*; *slight and inconclusive circumstances*, it is held, will not be sufficient.

In fact, it would be a repeal of the rule. The evidence necessary to constitute such assent, is to be found in the case of *Wilson v. Williams*, 14 Wend. R. 146.

• *W. R. Miles*, for defendant in error.

I suppose that the only error relied on by the plaintiff in error is the finding of the jury, and the refusal of the court to grant a new trial. It will be observed that no instructions were asked of, or volunteered by the court; and the cause went off on the circumstantial proof (as set out in the bill of exceptions) of the *recognition*, by Joseph Andrews, of Vance's authority to sign the firm's name to contracts of this character.

The proof, though presumptive merely, was certainly strong enough to authorize the finding of the jury; for proof of which I refer the court to Graham on New Trials, from page 380 to 400; also 1 S. & M. 157.

I would respectfully suggest to the court a consideration growing out of this case which I think entitled to attention. It is, that the opinion of the judge, before whom the issue is tried as to the *preponderance* of the evidence, is entitled to much weight. The position will be found stated in better language by Graham, p. 405.

Will the force of the principle be regarded as diminished by

the act of our legislature, which allows a review of the action of the circuit judge upon motions for new trials? I think not. For it will be remembered, that in England the *nisi prius* judge does not give or refuse a new trial, but merely expresses his opinion of the evidence to the other judges, after the return of the record to the court in banc. Here, we know the circuit judge does more; and may it not have been the chief, if not the sole object of the legislature in passing the statute referred to, to afford to motions for new trials (when the parties wish it) the same high consideration here which they receive in England; and without intending to diminish the respect which had always been attached to the opinions of the judge before whom the issue is tried? Unless I am greatly deceived, this is the true construction of our legislative innovation in regard to new trials.

Mr. Justice THACHER delivered the opinion of the court.

Writ of error to Yazoo county circuit court.

This was an action upon a promissory note, signed by "Vance & Andrews, sureties." Andrews pleaded *non assumpsit* under oath. A verdict was found against Andrews, who, failing in a motion for a new trial, brought his case into this court. The evidence disclosed that the copartnership name of Vance & Andrews was signed to the promissory note by Vance; that Vance was in the habit of signing the copartnership name as sureties and indorsers; that notices of the approaching maturity of such notes were left at the store of Vance & Andrews, where Andrews was in the frequent habit of visiting, although he was not the active partner of the firm; but there was no evidence of an actual knowledge by Andrews of the use of the name of the firm in this mode, and in the case of the note sued upon, he insisted that no such authority was confided to Vance.

Where one of two partners subscribes the copartnership name to a note as sureties for a third person, without the authority or consent of the other partner, the latter is not bound, and it lies upon the plaintiff to prove the consent or authority of the other

partner. *Foot v. Sabin*, 19 Johns. 154, and cases there cited. Such consent or authority may be presumed from sufficient circumstances.

There is nothing in the bill of exceptions which embodies all the testimony that expressly proves that Andrews authorized the use of the copartnership name as surety or indorsement, but there is express testimony that when such a use of the name came to his knowledge, he denied that any such authority was reposed in Vance. The presumption arising from the circumstance that Vance had been in the habit of using the copartnership name in such a mode, and that notices of the coming maturity of such obligations were left at the store of Vance & Andrews, which place Andrews visited every day, is sufficiently rebutted by the circumstance that Andrews was not the active partner, and could not therefore be fairly presumed to have looked narrowly into the transactions of Vance. The evidence certainly did not warrant the finding of the jury.

Judgment reversed, and a new trial to be awarded in the case.

DANIEL GREEN vs. FLETCHER CREIGHTON, Administrator de bonis non of Amos Whiting, deceased.

It is a general rule, that any one who seeks to reverse a judgment, must put his finger on the error, as every presumption is in favor of the correctness of judgments.

In an action at law on an administrator's bond, the bond is but inducement to the action, and no recovery can be had on it without proof of damages.

An administrator's bond, without proof of damages, is not a valid claim against an insolvent estate, or against any one.

A report of referees to whom a claim against an insolvent estate was referred, which shows that the amount of the penalty of an administrator's bond was allowed as a valid claim against the estate, without any proof of a breach of the conditions of the bond, or of damages actually sustained by the parties interested, is erroneous on its face, and may be set aside by the probate court, on exceptions being taken to it.

Referees to whom a claim against an insolvent estate is referred by order of the probate court, are not bound to report the evidence upon which they found their report; yet in all cases they ought to do so, as that is the only way by which the judgment of the appellate court can be had on the validity of the claim referred to them.

The recital in the bill of exceptions, that counsel relied, in the probate court, on the hearing of exceptions taken to the report of referees to whom a claim against an insolvent estate, founded on an administrator's bond, had been referred upon a decree of said court, fixing the amount of the administrator's liability on the bond as evidence in support of the report of the referees will not justify the high court of errors and appeals in deciding that there was such a decree, or that it was sufficient evidence to support the report, when no such decree appears in the record.

Where a claim was rejected by commissioners appointed by the probate court to audit claims against an insolvent estate, and afterwards referred to referees, and by them allowed, and exceptions taken to the report of the referees, which were sustained by the court, and the report set aside, it was held, that the decree of the probate court, setting aside the report of the referees, was not conclusive against the validity of the claim; and it was competent for the probate court to recommit the claim to referees.

APPEAL from the probate court of Claiborne county; Hon. William M. Randolph, judge.

From the record in this case, the following facts appear, to wit: That the attorney of Daniel Green presented to the commissioners appointed by the probate court of Claiborne county to receive and audit claims against the estate of Amos Whiting, deceased, which had been regularly declared insolvent, a claim amounting to sixty thousand dollars; and the commissioners rejected it, because in their opinion there was no evidence to support it; that Green then filed a petition under oath, stating that Amos Whiting in his lifetime became the surety of one Albert Tunstall, on a bond given by him as administrator of the estate of Wheeler C. Green, deceased, in the penalty of sixty thousand dollars; that on a final settlement, made by the said Tunstall, of his accounts as administrator, on a plenary proceeding against him for that purpose, the probate court rendered a decree against him in favor of the said Daniel Green, as sole distributee of the estate of Wheeler C. Green, for the sum of sixty-one thousand one hundred and seventy-five dollars and forty-seven cents, and ordered that the administrator's bond of said Tunstall, with said Whiting as surety thereon, be prosecuted for the payment of the same in any court having competent jurisdiction thereof; that a copy of said bond, duly certified, which is set out in the petition, together with a copy of said decree, had been presented to the commissioners appointed to audit claims against the estate of Amos Whiting, as evidence of said Daniel Green's claim against said Whiting's estate for the amount of the penalty of said administrator's bond; and that the commissioners rejected the same for want of legal evidence to sustain it. The petition avers the evidence to be amply sufficient to sustain the claim, and that the commissioners did wrong to reject it; and prays that the claim be referred to referees. Whereupon the court appointed referees to report on said claim; who at the next term of the court made their report, in which they embraced a copy of the said administrator's bond, and held the same to be a valid claim against the estate of the said Amos Whiting to the amount of sixty thousand dollars, and therefore allowed the claim of Daniel Green against said estate to that amount. The administrator excepted to the

report of the referees, because it was not founded on any evidence, and because the evidence relied on by the referees, as reported by them, was insufficient and incompetent, and ought not to have been regarded by them. The court sustained the exceptions to the report of the referees, and ordered it to be set aside; to which the said Daniel Green filed his bill of exceptions. The bill of exceptions recites that the counsel for Green relied on a copy of said administrator's bond, and also on the said decree of the probate court referred to in his petition for the appointment of referees as sufficient evidence to sustain said claim. From the decree of the court setting aside the report of the referees, Daniel Green prayed an appeal to this court.

John D. Freeman, for appellant.

The principal question to be decided by this court is whether or not the claim of Green was a legal demand against the estate of Whiting, of which Creighton was administrator. The bill of exceptions and the record shows that Whiting was the surety of Tunstall on his bond as administrator of Wheeler C. Green; that Tunstall had rendered his final account on the estate of said Green; that Tunstall was indebted to said estate in the sum of \$61,175, being \$1,175 more than the penalty of the bond; that on a plenary proceeding for that purpose, before the probate court, the latter had rendered a decree for that amount against Tunstall, and ordered his bond to be put in suit for the recovery of the same. The decree against Tunstall on his bond is not copied in the record, but the fact is set forth in bill of exceptions, signed by the probate judge, and moreover was not denied by Creighton. The estate of Amos Whiting was declared insolvent, and hence the bond on which he was surety could not be sued either in law or equity without the consent of Creighton, administrator of Whiting, which was never given. H. & H. 410.

The only method, known to the laws of this state, to prosecute this claim, was to present the same to the commissioners of insolvency. H. & H. 410. This was done, and the claim rejected. Green then had a right to the appointment of referees

Green v. Creighton.

to award on his claim. H. & H. 410. This was granted, the referees appointed, and on the evidence of the bond and the decree of the probate court against Tunstall and sureties, they allowed the claim to the amount of the bond. If the probate court had approved the award of the referees, it would have been final against the estate of Whiting. H. & H. 410. The court did not approve it, and the only remedy left to Green is an appeal to this court, which has authority to render the judgment which the probate court should have rendered. But it is contended that the liability of Whiting as surety of Tunstall could only be fixed by a judgment at law. Perhaps this might have been true if Whiting were living; but he is dead, and his administrator has reported his estate insolvent. We cannot sue his administrator either in law or equity; and if this court reject our claim, the administrator will distribute the estate, and Green will be left wholly remediless, and in the language of the statute, forever barred of his demand. H. & H. 410.

Upon a similar statute, in Massachusetts, it was decided that "when an estate is represented insolvent, the course of the common law in regard to the claims of creditors is stopped, and they cannot afterwards sue their claims, even though the estate should ultimately prove solvent; but the course pointed out by the statute must be pursued." 15 Mass. R. 264, marg.; 6 Pick. 330.

The petition of Green for reference, is sworn to and not answered by defendants, and the statements must therefore be taken as true.

James H. Maury, for appellee.

First. The appellant should have proved that Tunstall was appointed administrator of the estate of Wheeler C. Green, and that Whiting had joined him in the bond, on which administration was granted. The signing of an instrument in the form of an administration bond, does not make it a bond, unless it is approved and accepted by the court, and administration granted on the faith of it; and if such a bond, with every official sanction, really existed, it could not be substituted by a copy.

Secondly. He should have shown that he was a distributee or creditor, or bore some relation to the estate of Wheeler Green, that gave him an interest in it. But the bill of exceptions does not show that any such evidence was produced, either before the referees or the probate court.

Thirdly. He was bound to establish as a fact, that he had proceeded against Tunstall, the administrator, in the probate court, and had obtained a decree establishing against him the amount of his distributive share. Stewart & Porter's R. 7; 12 Wend. 492. The only allusion that is made to such a decree is that contained in his petition for reference, where he alleges that it had been laid before commissioners, whose report is not now the subject of examination.

Fourthly. Though a decree against an administrator is a prerequisite to any proceeding against his security on the administration bond, it establishes nothing more than the fact that there is such a decree, and furnishes no criterion of the extent of the security's liability. Such a decree is a necessary link of evidence to show a breach of the bond. But its admissibility to establish the amount of the liability of the security, is irreconcilable with every rule of evidence; since neither Whiting, the security, nor his administrator was, nor in the nature of things could have been, a party to the proceedings against Tunstall. 5 Litt. R. 304; 3 Yeates R. 128; 2 Hawkes N. C. R. 34, 43; 3 How. R. 236, where is cited 1 Starkie, 182 to 189; 5 Bin. 184. A more monstrous proposition of law could not be advanced, than that a decree against an administrator who had become inert and incapable of business, and besotted even to dementation, should be evidence against his security, who was no party to the proceedings and could in no way be subject to the jurisdiction of the court in which they were conducted. 1 Phillips's Ev. 320, 326; Gilbert's Ev. 29. The plaintiff, therefore, was bound to produce evidence independent of any decree against Tunstall, to establish the amount for which Whiting or his administrator was liable.

Fifth. The law in How. & Hutch. § 39, p. 396, provides that the bond may be prosecuted at the request of a party

Green v. Creighton.

grieved by a forfeiture of the condition. Though the statute allows a claim to be prosecuted against an insolvent estate in the probate court without the forms of pleading, it dispenses with the production of no proof that would be necessary to establish a claim in the circuit court. In the circuit court a declaration would have been had without an assignment of breaches; and the suit would have failed without proof of the breaches on the trial. 1 Stuart R. 435; 2 How. R. 617. If the plaintiff therefore had established a right to a distributive share in the estate of which Tunstall was administrator, he would yet be unable to maintain his suit against the security of Tunstall, without proof of a devastavit by a return of *nulla bona*, or a default of some kind on the part of Tunstall. For a mere existence of a balance for distribution is not *per se* a breach of the condition of the administrator's bond. 2 How. R. 617; 1 Stuart R. 435.

It does not appear from the record that any one of these facts was proved by the plaintiff in error, before either the referees or the probate judge. The evidence of neither party is set out in a bill of exceptions. And this court, being left entirely in the dark as to the merits of the controversy, will presume that the decision of the probate court was right.

Joseph Crapoo, in reply.

This case was referred to referees by the probate court, who made an award in favor of the claimant Green. The petition of Green, and the award of the referees sufficiently show the nature of the claim of Green.

The bill of exceptions shows nothing but the assertions of the counsel of the respective parties. It does not appear that any evidence was given in the probate court to sustain the exceptions of the defendant Creighton. The probate court, in setting aside the award, must have acted on those exceptions without any proof of their truth. The error which the probate court committed, was in setting aside the award without any proper showing or testimony.

The authorities of the defendant in error would be proper and

applicable if they did not beg the question. The defendant in error assumes that the plaintiff in error did not make out his case before the referees, and then proceeds to cite authorities to show that he ought to have done so. If the plaintiff in error had not made out his case before the referees, the defendant in error should have shown that fact by competent proof to the probate court, when it would have been proper for that court to set aside the award, and to have referred it back again; it was error not to refer it again: but the defendant in error assumes all this, and the court acted upon the same assumption, and sets aside the award, all of which was erroneous.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

It appears that the appellant presented a claim to the commissioners of insolvency, appointed to audit claims against the estate of Amos Whiting, which was rejected. He then prayed that referees might be appointed according to the statute, to report upon his claim, which was done, and they allowed the claim, but the appellee then excepted to the report, and the court sustained the exceptions and set aside the report.

The claim was for sixty thousand dollars, being the amount of the penalty of an administrator's bond, given by Tunstall, as the administrator of the estate of Wheeler C. Green, the appellant claiming to be the sole distributee, which bond had been signed by Whiting and others as sureties.

The referees reported that the estate of Whiting was liable to D. Green on this bond, in the sum of sixty thousand dollars, which claim was just, and by them allowed. The bond is referred to in the report as the foundation of the claim, and is an exhibit to the report, but there was no other evidence reported, or if there was, it does not appear in the record.

The statute provides for the appointment of referees in a case like this, and makes their report final when approved by the court, leaving it thereby as an inference which may be legitimately drawn from the act, that the court may disapprove it.

It is a general rule, that any one who seeks to reverse a judgment must put his finger on the error, as every presumption

is in favor of the correctness of judgments. By the application of a familiar principle of law to this report, the decision is not only not shown to be wrong, but it is shown to be clearly right; that is, assuming that the case was presented in the court below as it has been to us. In an action at law on an administrator's bond, it is but inducement to the action, and no recovery can be had on it, without proof of damages. The bond is only a security for such damages as may be sustained by parties interested in the estate. To make it a valid claim then against an insolvent estate, or against any one, it must be accompanied by proof of damages, but if it is not so accompanied, it is not a claim. There must be proof that the condition has been broken, for it is only on such a contingency that a right of action accrues. The report professes to be founded on this bond. It refers to it as showing the liability of Whiting's estate, and declares it to be a valid claim, and accordingly it was allowed. The report was therefore erroneous on its face; it was not the bond which constituted the claim, but the amount of damages Green had sustained by the maladministration of Tunstall; and instead of allowing the penalty of the bond as a claim, the referees should have allowed the amount of damages sustained by a breach of the condition; and if the damages were equal to the amount of the penalty, they should have been so reported. And even admitting that the referees were not bound to report the evidence on which they founded their report, still having done so, it was competent for the court to set aside the report, if the evidence was palpably insufficient to sustain it. It would seem to be the safest course in all instances for referees to report the evidence. It is the only way in which the judgment of the appellate court can be had on the validity of a claim. If the evidence is reported to the probate court, the judgment of that court can then be corrected if it is wrong, by placing the evidence on the record.

It would seem, from the bill of exceptions, that there was probably a decree of the probate court fixing the amount of Tunstall's liability introduced before the referees, though it is

matter of doubt. Counsel insisted before the probate court that the evidence of the bond and the decree of that court were sufficient to justify the report. If there was such a decree, the amount of it does not appear in the record. We cannot judge of its legal effect when it is not before us. The bare recital in the bill of exceptions that counsel relied upon such a decree as evidence to support the report, will not justify us in deciding that it was sufficient for that purpose.

It was objected, in argument, that the decision of the probate court was conclusive as to the validity of the claim. We do not think so; the court only decided against the report, not against the claim. The report of referees is final only when affirmed. The power of the probate court over a report of referees was very fully considered by us, in the case of *Reed v. Wiley*, 5 S. & M. 394. The power of the court to reject the report and to re-commit the claim to referees was asserted; and this court reversed the judgment affirming the report of referees, and directed that the matter should be again submitted to them. On the authority of this case, it is competent for the court below to recommit the claim of Green to referees, if it should seem to be necessary; and this perhaps is now the only method which will bring up the merits of the claim for final adjudication. In affirming the judgment therefore, we do not decide against the validity of the claim. We only decide against the report of the referees, leaving the court to direct that it be again referred.

Judgment affirmed.

LEWIS SANDERS, JR., RICHARD W. SAMUEL, and ROBERT RABE,
vs. LYDIA DOWELL.

Where the addition of "junior" is affixed to the name of a party against whom process is issued, and the officer returns the process served upon the nomination of the party, omitting only the addition of "junior," in the absence of any proof showing that the process was in fact served upon the wrong individual, the presumption is, that the officer did his duty, and executed the process upon the right person.

The statutes passed by the legislature for the regulation of proceedings in chancery, are to be applied to such suits in the circuit courts; final decrees, therefore, may be entered by the circuit courts, at the same term a bill is taken for confessed; such course being authorized by the statute, in regard to the superior court of chancery.

Whether the rules of the chancery court, adopted by the chancellor, are applicable to equity causes in the circuit courts, — *Quære?*

There is no rule of the circuit court requiring a commissioner, to whom an account is referred to state and report the amount due the complainant in a bill to foreclose a mortgage, to give the defendant notice of the time and place of taking the account; yet, if no such notice be given, and the defendant object to a confirmation of the commissioner's report, on that ground, and at the same time shows any good reason for a recommitment of the account, the objection should be sustained, and the recommitment made. But if the defendant permits the commissioner's report to be confirmed by the court, without objections, he must be taken to have waived any he may have had to it.

It is necessary that a sale of mortgaged premises, made by a commissioner under a decree of foreclosure, should be confirmed by the court.

ERROR, from the chancery side of the circuit court of Adams county; Hon. Charles C. Cage, judge.

Lydia Dowell filed a bill on the chancery side of the circuit court of Adams county, on the 2d of May, 1840, representing that on the 9th day of January, in the year 1838, Lewis Sanders, Jr., Richard W. Samuel, and Robert Rabe, stood

jointly indebted to one Cornelius Haring, since deceased, in the sum of eight thousand dollars, evidenced by two bills of exchange, bearing date January 1, 1838, drawn by Samuel, payable to the order of Rabe, at the Planters Bank, in the paper of said bank, (meaning the bank-notes of said bank,) the one, fourteen months after date, and the other on the 1st of March, 1840, for four thousand dollars each, both directed to Sanders, Jr. and accepted by him, and indorsed by Rabe to said Haring, which bills are in the possession of complainant, and made exhibits to the bill. That Samuel, Sanders and Rabe, to secure the payment of the bills, then the property of Haring, on the said 9th day of January, 1838, mortgaged to the said Haring, lots No. 3 and 4, in Square C, of college lots, in the city of Natchez; the mortgage to be void on the payment of the bills of exchange. The mortgage is made an exhibit to the bill. That on the 7th day of July, 1838, before the payment of the bills, and whilst the same and the mortgage were held by Haring, he, for the consideration of eight thousand dollars, assigned the mortgage and bills of exchange to complainant, by means of which she acquired all the rights of Haring in the mortgaged premises and bills, of which defendants had notice; that when said bills respectively became due, they were regularly presented for payment at the place therein specified, and payment being refused, were both protested for non-payment; and the estate in the mortgaged premises, by virtue of the assignment and non-payment, had become absolute; that Sanders, Samuel and Rabe, have the possession and enjoyment of said premises, and, although requested so to do, they had failed to pay said bills, or satisfy said mortgage. The bill makes Sanders, Samuel and Rabe defendants, and prays a decree against them for the amount of the bills; and on failure thereof, that the equity of redemption of the defendants, in the mortgaged premises, be foreclosed. The subpoena was returned, "Executed on Robert Rabe, Richard M. Samuel, and Lewis Sanders." The cause was continued regularly, until the 23d day of December, 1841, when a *pro confesso* was taken against all of the defendants, and the case referred to Samuel Wood, commissioner, to com-

pute and report amount due to complainant; on the same day the commissioner reported the amount due by defendants to be the sum of nine thousand seven hundred and eighty-seven dollars and fifty cents; and on the same day the court returned a decree against the defendants, confirming the report, and decreeing that the mortgaged premises be sold at public auction to the highest bidder, at the door of the court-house of the county of Adams, on a credit of six months after advertising the time and place of sale, according to law, and appointed Samuel B. Newman, sheriff of the county, commissioner, to carry the decree into effect. That Newman, on the 7th March, 1842, reported that he had sold the premises, after advertising, &c. for thirty days, and that the complainant had become the purchaser, at the price of three hundred dollars. The record does not show whether this report was confirmed, or not.

From which decree the defendants prosecute this writ of error. The errors assigned are, 1. The decree rendered in the circuit court, taking the bill of complaint for confessed, and referring to a commissioner to compute the amount due to complainant, is erroneous. It not appearing that the subpoena, in chancery, had been served upon the defendant, Lewis Sanders, *Junr.* 2. The court erred in confirming the commissioner's report on the same day of the appointment of the commissioner and making his report, and because said report is erroneous, as it finds an amount in *dollars*, instead of "Planters Bank money," or their bank-notes, the thing agreed to be paid in the bills of exchange specified. 3. The circuit court erred in pronouncing the final decree in the cause, because there is no proof in the cause of the assignment of said mortgage to Lydia Dowell, nor of the indorsements upon said bills, or their protest for non-payment and notice thereof, nor of the value of the notes of the Planters Bank. 4. The decree pronounced by the circuit court, directing a sale of the equity of redemption of the defendant, in and of the mortgaged premises, is erroneous, because no day was given to the defendants for the payment of the money due on said mortgage, and because the said Haring, nor his heirs or representatives, are made defendants to said suit.

Sanders and Price, for plaintiffs in error.

The first error is well taken; the return must show that the persons named in the subpœna were served with process; the name of Sanders, in the subpœna, is different from the one returned as served by the sheriff. If the return had shown the subpœna to have been served upon the defendant, Lewis Sanders, the law would have aided the return in the presumption favoring the act of the sheriff by his qualifying description of defendant.

The second error we regard as manifest, upon both points made in it. We know of no rules, established by the circuit court, in regard to the time allowed to a commissioner to make a report, or the notice to be given to the opposite party; but all analogy would seem to require a day to be given, either of the time and place of taking the account, or to examine the report, after it is made. By the rules of our superior chancery court (Rule XXIII. § 2,) it is provided, "When a matter is referred to a commissioner, to examine and report thereon, he shall assign a day and place therefor, and give reasonable notice to the parties, or the attorneys of the parties, by personal service, or by advertisement in the nearest newspaper," &c Had the defendants been thus notified, they could have appeared before the commissioner, and shown that the Planters Bank paper was of less than half its nominal value. That it was depreciated is a matter of the history of the county, which the courts judicially take notice of; and the court should have decreed the payment of the specific paper, or its value in money at the time of the dishonor of the bill. *Gordon v. Parker*, 2 S. & M. 495.

The other errors are also properly taken, and the reasons assigned sufficiently establish them as such; that a day should be given for the payment of the mortgaged debt is so universally recognized by all equity courts, that no authority will be required or adduced.

The whole property, being the same for which the bills and mortgage were executed, and upon which the plaintiffs in error had expended as much more, was sold for three hundred dol-

210 HIGH COURT OF ERRORS AND APPEALS.

Sanders et al. v. Dowell.

lars, is of itself sufficient to taint the decree with suspicion. Wherefore we insist that the decree of the circuit court be reversed, and the cause be remanded for further proceedings, as may be equitable and just.

J. T. McMurren, for defendant in error.

1. The first error assigned, that the subpoena had not been served on Lewis Sanders, Jr. we conceive, is assigned by mistake, as the sheriff's return shows a service on him. It is true the sheriff has neither added Jr. or Esq. to his name, but there is no pretence that the service was not on the defendant.

2. The second error assigned is, that the commissioner, appointed to report the amount due on the mortgage, made his report, and the same was confirmed, and all done on the same day. It is the first time we have seen it assigned *for error*, that the court and its officers acted with too much speed; and we will touch it but gently. As to the payment or report being in Planters Bank paper—If this paper was below par, and it were competent to show it, it devolved on the defendants to show it; and there is no error, in this respect, apparent on the face of the decree.

3. As to the third error assigned, it appears distinctly by the record, that the mortgagee Haring assigned the mortgage to the complainant, and indorsed the notes to her, as shown by the report of commissioner Wood, and the exhibit A to his report. Besides, if this did not appear of record it would be no error; proof in writing, or orally, before the commissioner, would be sufficient, and the same would not appear of record. Besides, the *pro confesso* shows or admits the fact.

4. The fourth error assigned is, that no day of payment was given to the defendants by the decree, and that Haring's heirs or representatives were not made parties. As to this latter branch of this assignment, Haring, if living, or his personal representatives or heirs, if he were dead, had no interest whatever in the subject-matter of the controversy, and could not properly have been made parties; no decree could have been rendered for or against him or them.

With regard to a day of payment, extended to the defendants, this was a matter resting entirely in the discretion of the court, and not to have given a day cannot be assigned for error. Courts of equity have adopted the proceeding under a mortgage, to save the estate from vesting absolutely in the mortgagee, at law, on the non-payment of the debt on the day limited. And the object of this principle, governing a court of equity, is fully complied with in the decree in this case. The property is decreed to be sold, but it is to be done after legal notice, a thirty days advertisement; and, until the sale-day, the mortgagors have to pay the amount of the decree.

The decree is substantially the same with the form adopted in the court of chancery of New York, in such cases. 3 Hoffman's Ch. Pr. App. 243. The only difference, on the face of the decree is, that the words, "unless the mortgagor pay previous to the day of sale," &c. are not inserted in the decree, in the present case. And the addition of these words amount really to nothing, for the defendants were entitled to pay the money at any time before the sale, without these words being inserted, as fully as they would be if these words were inserted. More than sixty days intervened between the date of the decree and the sale; and we conceive the court will not disturb the rights of the parties on such a ground, on a writ of error, instituted more than two years after the sale. But the form in 3 Hoffman's Ch. Pr. 244, is precisely the same as in this case; no day given for payment, and no doubt the draftsman who prepared this decree, drew it from the precedent just cited.

Mr. Justice CLAYTON delivered the opinion of the court.

This was a bill filed in the circuit court of Adams county, to obtain a decree for the foreclosure of a mortgage executed by the appellants. The process was returned executed upon the parties' nomination, and is without objection, except that the return omits the addition of *junior*, appended in the process itself, as an affix to the name of Lewis Sanders. No appearance was entered by the defendants, and after two continuan-

ces, the bill was taken for confessed, and the matter thereof decreed at the same term, after an account had been taken by the clerk, without notice to the defendants. A sale of the mortgaged premises took place; the commissioner executed a deed, and returned it into court, but whether the sale was confirmed, nowhere appears. Various objections are taken to the proceedings.

First, as to the sufficiency of the return upon the process. If the process were in fact served upon the wrong individual, some course should have been taken to make the fact apparent. The only objection to it, is the omission of the addition "*junior*." The presumption upon the face of the return is, that the officer did his duty, and executed the process upon the right person; if this were not the fact, it should be denied in some tangible manner.

As to the entering of the decree at the same term at which the bill was taken for confessed — this is authorized by statute, in regard to the superior court of chancery. How. & Hutch. 523. A statute also directs that the course of proceeding in equity cases, in the circuit courts, shall conform to the course in the superior court of chancery, in similar cases. How. & Hutch. 480. We do not think there was any error in this. We do not now decide, that the rules of the chancery court, adopted by the chancellor, are applicable to equity causes in the circuit courts; but that the statutes passed by the legislature for the regulation of proceedings in chancery, are to be applied to such suits in the circuit courts.

There is another objection, that no notice was given by the commissioner of the time and place of taking the account. If this objection had been made in the court below, it should have been sustained, if the party had at the same time disclosed any reason for a recommitment of the account. But no exception was taken in the court below upon this ground, and the report was confirmed, without objection. There is no rule of the circuit court requiring notice in such case. The taking of an account is but a mode adopted by the court, of ascertaining the amount due, to relieve the judge from making the calculations

himself. It bears a strong resemblance to a writ of inquiry of damages, after judgment by default. Although the appellant might not have been bound to notice the proceedings before the commissioner in taking the account, yet he was bound to notice the action of the court in confirming it. He was constructively in court; then was the time for his objections; and as he made none, he must be taken to have waived any.

The last objection is, that there was no confirmation of the sale of the mortgaged premises. According to the case of *Tooley v. Gridley*, 3 S. & M. 493, this was necessary. For this reason the decree will be reversed, and the cause remanded, with leave to the party to file exceptions to the sale, when the court below will have right to confirm it or set it aside, as the facts and circumstances may warrant. This decision, however, is to affect nothing which preceded the interlocutory order directing the sale.

Decree reversed, and cause remanded.

JOHN JOHNSTON vs. MARCUS F. BEARD.

A declaration by a vendee who has received from his vendor a bond to make title on payment of the purchase-money, against the obligor therein for a failure to make title, is fatally defective which neither avers that "the vendee, demanded a deed of the vendor," nor that "the vendee prepared a deed and tendered it to the vendor and demanded its execution."

Whether the vendee, who has a bond for title on payment of the purchase-money, can maintain an action against his vendor for a failure to make title, after having demanded a deed of the vendor, or whether he must have prepared a deed and tendered it to the vendor and demanded its execution ; *Quære?*

If a plea be defective in form, yet appropriate to the action and going to its substance, it is error to strike it out or reject it ; it must be disposed of by demurrer.

It seems, where a demurrer to a declaration is overruled and the defendant offers a good plea in bar of the action, with an affidavit of its truth attached to it, such affidavit will be equivalent to an affidavit of merits, and the plea ought to be received.

In error from the circuit court of Clark county ; Hon. Henry Mounger, judge.

Marcus F. Beard sued John Johnston, Sen. in an action of debt on a penal bond, the condition of which was as follows, viz.:

"That the said Marcus F. Beard had purchased of the said John Johnston, Sen. a certain tract or parcel of land, lying and being in the county of Newton, and state of Mississippi, known as section" No. 32 & 33 in T. C. R. 13 E. containing 1280 acres, more or less, "and made his notes unto the said John Johnston, Sen. in payment for the same. It was conditioned that if upon the payment of said notes by said plaintiff or his legal representatives, the said defendant shall make or cause to be made unto the said plaintiff or his legal representatives, good and sufficient titles, free from all incumbrances, and also until the said titles are made, guarantee unto the said plaintiff or his legal repre-

sentatives, the peaceable possession and full enjoyment of said parcel of land and all that thereunto appertains, without any suit or hindrance in any manner of the said defendant, or any person or persons whatsoever, then that obligation to be void, otherwise to remain in force and virtue."

The declaration, after setting forth this condition, continued as follows, viz.:

"Although the said plaintiff hath well and truly paid and satisfied said notes so given unto the said defendant in payment of the said tract or parcel of land in said condition mentioned, to wit, on the day and year aforesaid, in the county aforesaid; yet the said defendant did not, upon the payment of said notes by said plaintiff as aforesaid, make or cause to be made unto the said plaintiff or his legal representatives, good and sufficient titles, free from all incumbrances, to the tract or parcel of land in said condition mentioned, but the said defendant hath hitherto wholly neglected and refused, and still neglects and refuses so to do, by reason of which said breach the said writing obligatory became forfeited, and an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum, above demanded." The conclusion was in the ordinary form.

The defendant appeared, and without craving oyer of the writing obligatory, demurred, and assigned the following causes of demurrer: 1. "There is no amount of the consideration alleged in said declaration for which said supposed bond was executed, nor is it averred at what time said notes of said plaintiff became due and payable, or when, or in what manner, they were paid to said defendant. 2. Because it is not alleged in the declaration that plaintiff ever demanded of the defendant a transfer by sufficient means of the land in said supposed writing obligatory mentioned, or any part thereof. 3. Because there is no allegation in the declaration that the plaintiff tendered to the defendant a deed to the lands in the declaration mentioned, and demanded of him its execution to the plaintiff.

Upon argument the court below overruled the demurrer to the declaration; when the defendant moved the court for leave to file a plea, which is in substance as follows: That on the 13th of May,

1842, the defendant and his wife did "grant, bargain, sell and convey unto the said plaintiff the following described lots or parcels of land, to wit: section 36, the south half of section 25, in township 6, range 12 east; the west half of section 31 in township 6, range 13 east, and the north-east quarter of section 1, in township 5, range 12 east, except the west half of the north-west quarter of section 31, township six, range 13 east; all in the county of Newton and in the Augusta land district, of the state of Mississippi, containing $1565\frac{9}{100}$ acres, more or less, and the said defendant and his wife as aforesaid, thereupon on the day and year aforesaid, in the county of Jasper, to wit, in the county aforesaid signed, sealed and delivered to the said plaintiff a deed conveying the land aforesaid, together with all and singular the rights, privileges and appurtenances thereof to the said plaintiff, his heirs and assigns forever, which said deed, so executed, and containing a covenant on the part of said defendant and his said wife, to and with the said plaintiff, his heirs and assigns, to warrant and forever defend the lots of land and premises aforesaid and every part thereof unto the said plaintiff, his heirs and assigns forever, against the lawful demands of all and every person or persons whatsoever, the said plaintiff on the day and year aforesaid, to wit, in the county aforesaid, did agree to accept, take and receive, and the same then and there accepted, took and received from the said defendant in full payment and satisfaction of the bond or writing obligatory in the plaintiff's declaration mentioned, and so the defendant says he has fully paid off, satisfied and discharged the said bond or writing obligatory in the plaintiff's declaration mentioned, and this he is ready to verify, wherefore he prays judgment, &c." This plea was accompanied with an affidavit made in open court that the plea was true in substance and in fact.

To the filing of this plea the plaintiff objected on the ground that "it was not a good plea," and was no defence to the action. The court would not permit the plea to be filed "but ruled it out," to which opinion the defendant excepted, and prosecuted this writ of error.

No brief was filed by the counsel for the plaintiff in error.

George Calhoun, for defendant in error, contended,

1. That the defendant, by applying for leave to plead, abandoned his demurrer and his right to insist on it in this court.

2. That the demurrer was properly overruled. *Evans* on Pl. 28; 2 Black. Comm. 340.

3. The plea of accord and satisfaction was bad. *Hurlstone* on Bonds (Law Lib.) 128; *Preston v. Christmas*, 2 Wils. 86; *Selwyn's* N. P. 455; *Cro. Eliz.* 46; *Cro. Jac.* 254; 1 Com. Dig. 198, and authorities there cited; *McWaters v. Draper*, 5 Monroe, 497; *Selw. N. P.* 431; *Blake's case*, 6 Rep 43; *Hurlstone* on Bonds, 72, and authorities cited; 1 Esp. Nisi Pr. 262, title Debt; 1 Com. Dig. 202; *Selwyn's* N. P. 455; 1 Saund. Pl. & Ev. 33, 34; *Hawkshaw v. Rawlings*, 1 Stra. 23; *Paine v. Masters*, Ib. 573.

4. The plea was properly rejected, because it was unaccompanied with a proper affidavit. *Rev. Code*, 119, 120; the oath to the plea is not a compliance with the statute.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action of debt upon a bond for title, binding the obligor to make title, upon payment of the purchase-money. A demurrer was filed to the declaration. The second cause assigned is, "that the plaintiff never demanded a deed of the defendant;—the third, that the plaintiff has not alleged that he ever prepared a deed and tendered to the defendant and demanded its execution." The court below overruled the demurrer. In this we think there was error.

In New York, the rule is that where a party covenants to convey, he is not in default until the party who is to receive the conveyance, being entitled thereto, has demanded it, and having waited a reasonable time to have it drawn and executed, has made a second demand." *Connelly v. Pierce*, 7 Wen. 130. In England the party entitled to the deed is bound to have it prepared, and presented for execution. The purchaser is to be at the expense of the conveyance. We need not now determine

which of these is the correct rule, since one or the other undoubtedly is. If either be adopted this declaration is bad.

After the demurrer was overruled, the defendant offered a plea of accord and satisfaction, with an affidavit of its truth, which was intended as an affidavit of merits. This plea the court upon motion rejected. In this we think also there was error. If the plea were defective in form, though we perceive no such objection, if it were appropriate to the action and went to its substance, it was error to strike it out or reject it. *Smith v. Bank of Rodney*, 6 S. & M. 83.

The judgment is reversed and cause remanded.

JAMES D. MURDOCK ET AL. v. ROBERT H. HUGHES ET AL.

In 1818, a widowed mother purchased a slave, partly with funds of her own, and partly of her children, and received the slave into her possession, and in 1825, the mother having married again, her husband conveyed the slave and her increase to the children of the second marriage; in 1833, the children of the first marriage became of age, but took no steps to assert their rights to the slaves until 1841: *Held*, that they were barred by the statute of limitations.

Where a purchaser of property buys it with the money of another, the trust thereby created, in favor of the party whose money is thus used, is an implied and not an express one, and is subject to the statute of limitations; continuing, express trusts forming the only class protected from the operation of the statute; where, therefore, the trustee denies the right of his *cestui que trust*, and asserts an adversary claim, it is an abandonment of the fiduciary character, and the statute of limitations will commence running from that day, if there be no disability as to the other parties.

On appeal from the vice-chancellor's court, at Fulton: Hon. Henry Dickinson, vice-chancellor.

Robert H. Hughes and others, complainants, allege in their bill, that Thomas Hughes, the father of same, and grandfather of the rest of complainants, died in Alabama, in 1814, leaving considerable personal property and valuable real estate; and that his widow, Nancy Hughes, was appointed administratrix of the estate, and guardian of the children, and took into possession all the real and personal estate, and enjoyed the rents and profits of the same, for herself, until 1818; and afterwards for herself and John McVay, whom she married in that year; that with the labor of her children, (the complainants,) and with the rents of the lands, in the year 1818, and before her marriage with McVay, she bought a negro girl, Julia, of one John Wilborne, taking the bill of sale, for the same, to herself and the complainants, as heirs of Thomas Hughes; that at the time of

Murdock et al. v. Hughes et al.

purchase, she told Wilborne that the negro was purchased with funds belonging to the estate of said Thomas Hughes, for the use and benefit of complainants and herself; that the bill of sale was lost or destroyed. At the time of purchase, it was understood and agreed upon by complainants and herself, that said negro and her increase were to remain with said Nancy, to assist in raising and educating complainants, to support her in her old age, and after her death to be divided between complainants and herself; that she had two children by her marriage with McVay, one of whom was dead, and the other, Belvidere, had married James Murdock, one of the defendants; that the negro girl Julia was then dead, but had left several descendants, mentioned in the bill, who are severally supposed to be worth the sums therein mentioned; that during the minority of complainants, said McVay, without the knowledge or consent of complainants, made a deed of gift of said negroes to the two children which he had by said Nancy; that the deed was recorded in Madison county, Alabama, and shortly thereafter, McVay removed with his wife and complainants to Lawrence county, Alabama; and afterwards, in 1837, to Itawamba county, Miss. where he died in 1841; that after the death of McVay, Murdock took the negroes out of the possession of Mrs. McVay; that McVay both before and at the time of his marriage, well knew that the girl Julia and her increase belonged to complainants, and that she had been purchased with the funds belonging to them, as heirs of Thomas Hughes; that complainants were ignorant of the deed of gift, until after the death of McVay; at the time of its execution they were minors, under the control and guardianship of their mother, and that they were informed both by their mother and McVay that the girl and her increase belonged to them, and that no obstacle would be thrown in the way of their possession of the same, after the death of their mother; that Murdock, without any legal or equitable title, had taken the negroes into his possession, and complainants believe that he will sell or dispose of them so as to defeat the claim of complainants. The bill prays for writs of *ne exeat* and general relief. An amended bill states that since the institution of this

Murdock et al. v. Hughes et al.

suit, the said Nancy had intermarried with one Duke, states the substance of the original bill, and prays for an injunction restraining Murdock from carrying off the negroes.

The original bill was filed on the 13th of December, 1841.

The answer of Mrs. McVay, admits the death of Thomas Hughes, her administration and guardianship; of her intermarriage with McVay; and states that there were one hundred and twelve acres of land and some personal property, belonging to said estate; that she administered the personal estate, and that the sum of \$158 98 $\frac{1}{2}$ remained in her hands for distribution, in April, 1820, when she presented her final account. That by the law of Alabama she was entitled to, and received one-third part of the personal estate; admits that she resided upon and cultivated the land, until William Hughes arrived at the age of twenty-one years, when she gave up to complainants the land, and they disposed of it, she never having had her dower assigned. She admits the purchase of the negro Julia for \$600, and states that she executed her note for \$200, part of the consideration payable in twelve months, which sum was paid by McVay after the marriage. She denies positively that the girl was bought with the funds of complainants, or for their use, or that the bill of sale was taken to her and complainants, but states that it was taken to her alone. That she is apprehensive that the bill of sale has been destroyed by complainants, and that McVay paid to complainants, as heirs of Hughes, their distributive shares, ranging from \$30 25 to \$36 00, as they severally arrived at age, taking their receipts therefor, and which are filed with the answer, as exhibits; and that the rents and profits of the land, with even her own labor, were insufficient to educate and support the complainants, and that McVay, even after the marriage, paid several debts incurred for them, amounting to \$400, in addition to the \$200 before paid. She denies that there was any understanding that Julia and her increase were to be divided between her and complainants. She admits that the deed of gift was executed in 1825, to her two daughters, by McVay, and states that it was recorded; and that, according to her belief, complainants knew

of its existence. Admits that McVay, at his death, in June, 1841, left the negroes in possession of herself, except two who had been delivered to Murdock, in 1837; that the balance of the negroes were delivered to Murdock, and taken into his possession immediately after McVay's death, where they now remain. Denies that McVay, before, or at the time of his marriage, knew that the negro girl belonged to complainants, and had been purchased with their funds, but the reverse thereof; that said negro had been purchased by her, by the consent of McVay before the marriage, and that he loaned her \$100 to assist in making the first payment, and that after the marriage he paid the balance of the purchase-money with his own funds, and not with the funds of complainants. Denies that she and McVay ever informed the complainants that the negroes belonged to them as heirs of Thomas Hughes, deceased. That Robert H. Hughes, who filed the bill, and was one of the heirs of Thomas Hughes, attained his majority on the 8th of April, 1833.

Murdock, in his answer, positively denies that he ever intended running the negroes. States that all of the complainants were of age, as early as 1833, more than six years before filing this bill, and insists on the statutes of limitations.

One exhibit, filed with the answer, shows that at the final settlement of the estate by Nancy McVay, in 1820, as administratrix, there were in her hands for distribution the sum of \$158 98 $\frac{1}{2}$.

John W. Carney states, that he cultivated about 11 acres of the land mentioned in the bill as the property of Thomas Hughes, deceased, at \$9 per acre per annum; that James Wilborne also cultivated it for several years at the same rent, viz. \$9 per acre, and that a man by the name of Ross also rented it. Witness paid his second year's rent in improvements on the place, and Wilborne paid the money for the first year, but made some arrangements for the payment of the rent after that time; that he saw more than \$500 paid in money for rent, and also a large amount of produce, value not known, which was paid to Mrs. Hughes; that she in 1818 purchased the negro

girl Julia of Wilborne, for \$600, and paid for the same with the money received from the rent of the land and the labor of complainants, \$500 from the rents, and \$100 from the labor. That he was consulted by Mrs. Hughes when she purchased the girl; she said she wished the negro to be the property of complainants; that the funds with which she paid for the negro belonged to them, and that she was about to marry McVay. The bill of sale was given by Wilborne to her, and so drawn as to vest the right of said negro in complainants; that he heard McVay state that he had no title to Julia; that Mrs. Hughes, about one year after her marriage with McVay, received \$200 from South Carolina, which belonged to the estate of Thomas Hughes. This money was changed into Alabama money, amounting to \$230, and handed by witness to McVay. On cross-interrogatory he states that funds received from South Carolina arose from the estate of William Scott, deceased, the father of Mrs. Hughes.

James Wilborne, one of complainants' witnesses, states, that in 1817, he cultivated 23 acres of the land, at a rent of about \$92, payable in corn; in 1818, 28 acres at \$4.50 per acre; in 1819, 6 acres at \$9 per acre; and in 1820, 6 acres at \$9 per acre; and during all that time the heirs of Hughes cultivated about 20 acres in corn for the support of the family. That he sold the negro girl Julia to Mrs. Hughes in 1818, for \$600, \$100 was paid in cash, and \$300 was paid in the rent of land, and by the complainants picking out cotton at \$1.50 per hundred. Mrs. Hughes gave her note for the balance at 12 months, \$54 of which was paid by the rent of the 6 acres of land in 1820, and the balance paid by McVay after Mrs. McVay returned from South Carolina. Mrs. Hughes refused to buy the negro unless complainants would assist in paying for her, which they promised to do, and which they did by picking out cotton. Mrs. Hughes told complainants, in the presence of witness, both before and after the purchase, that she only wanted the girl her lifetime, saying that the girl should be theirs. Has heard McVay many times say that the girl did not belong to him, that he had no right to her, &c. He did not recollect how the bill

Murdock et al. v. Hughes et al.

of sale was drawn; at the time of its execution there was a talk about its being so drawn as to give the girl to Mrs. Hughes and her children, but does not recollect whether it was so drawn.

Elizabeth H. Anderson, and S. H. Rives, complainants' witnesses, state, that they recollect the purchase of the girl Julia, and they understood from Mrs. Hughes, that complainants' land was rented to pay for her, together with other means belonging to them to the amount of \$100. Heard her say that she purchased said girl for the benefit of complainants. Heard McVay say that he would have nothing to do with the negroes, and also heard Mrs. McVay say she wanted to go to South Carolina to get funds to pay for the negroes, and that McVay should have nothing to do with them, and no claim to them.

William Thom, complainants' witness, states, that he knows the land of the estate; that Mrs. Hughes informed him, that from 1818 to 1825 it had been cultivated by McVay, Wilborne, Hathcock, and Lewis, and in 1825 by McVay and complainants. She sold her dower right to William Hughes, one of complainants, in 1825; he heard her state that McVay never paid one dollar for the negro Julia, but that the rents of the land, the labor of the complainants, and some two hundred dollars which she received from South Carolina, and which belonged to her first husband, Thomas Hughes, deceased, had paid for the girl; that she purchased the negro for the use of the complainants; he had heard McVay and Mrs. McVay disputing about the treatment of their negroes, and frequently heard Mrs. McVay say that the negro Julia and her children belonged to Mrs. McVay and complainants, and that there was an agreement between him and Nancy before their marriage, that she was to keep the negroes, only he was to use them during his life time, and that they did not belong to him.

Adolphus A. Hughes, complainants' witness, states, that he knows the land, that it was rented to different persons, and that McVay and wife sold her dower interest to William Hughes. Has heard Mrs. Hughes say, that she bought Julia with the funds belonging to the heirs of Thomas Hughes, and that com-

Murdock et al. v. Hughes et al.

plainants would get her; heard McVay state, that Julia did not belong to him but to Mrs. McVay. Heard Mrs. Hughes say that she received two hundred dollars from South Carolina, and used it in the last payment for the negro.

James Hughes, complainants' witness, states that he has heard the defendant say, that she sold her dower interest to William Hughes, and that she had bought the negro girl Julia for complainants, and with the funds of Thomas Hughes, deceased. Has heard McVay say that he had no right to Julia and her children, but that they belonged to Mrs. McVay.

James Falkenburg, complainants' witness, states, that he lived with Murdock, one of the defendants, in 1838, and that the five oldest of the negroes were in his possession for eight or nine months, in that year, under a deed of gift, as he stated, from John McVay, the father of his wife. Heard Murdock say, before the Hugheses should have said negroes, he would run them to Texas, and also heard him say, that he had persuaded his wife to move to Mississippi, that he might get the negroes into his possession, and hold them long enough to let the statutes of limitations bar the right of complainants.

John H. Thom, complainants' witness, states, that he has heard McVay say, that Julia was bought with the means of the estate of Thomas Hughes, deceased, and that complainants would some day get her and her children, but that he expected they would not interrupt them until his death, and the death of his wife. Has heard both McVay and his wife say that they had agreed before marriage that each should retain the property belonging to either before marriage, that Nancy should keep Julia and her increase until complainants arrived at age, then they should have them. Heard both McVay and wife say that Julia was bought with the funds belonging to the estate of Thomas Hughes, and for complainants.

John Beacham states the value of the negroes to be about three thousand dollars. States that the negroes Abram and Amanda have been in the possession of Murdock since 1837, and the balance since the death of McVay; that he heard one of complainants say about 1833 that he would have the negroes,

and also thinks he heard one of them talk about the deed of gift about the same time.

John Hathcock states, that he heard Mrs. McVay, after her marriage with McVay, state that she purchased the negro girl Julia, and that McVay paid for her after the marriage. Heard McVay say the same thing. Knows nothing about the land or the rent. The reason assigned by McVay and wife to witness for making the deed of gift was that Mrs. McVay had purchased the negro before the marriage, that McVay paid for her afterwards, that there were two sets of children, that they were disputing about the negro, that to settle these disputes the settlement had been made upon the two children, they being young and uneducated. Complainants lived at McVay's, and went to school. Does not know anything about their education.

Lancaster McVay, defendants' witness, states, that defendant Nancy purchased the girl in 1818 for six hundred dollars. Previous to the purchase she consulted with John McVay, father of witness, who told her that he would assist in paying for the girl, as she, Nancy, said she was not able to pay for her; said Nancy paid some of the purchase-money, and McVay paid two hundred dollars and something more, as witness believes. The bill of sale was made to Nancy Hughes and heirs; that all the complainants had full knowledge of the deed of gift; he conversed with all on the subject. That he is the son of John McVay, and that he was about 11 years old when the negro was purchased, and never heard either John or Nancy McVay ever intimate that the girl belonged to complainants; he also stated the ages of the different complainants.

Hugh McVay, defendants' witness, states, that the girl Julia was purchased in 1818 or 19, for \$600. The purchase-money was obtained from John McVay, he borrowing \$200 for that purpose. That bill of sale was given to Nancy Hughes and her heirs; that the complainants knew of the deed of gift, and they stated that they would set it aside. The oldest complainant was born about 1800, and the youngest was about six years old at the time Nancy married McVay. Witness was born Nov. 1798, and is son of John McVay. On cross-interrogation

states, that he never heard McVay say that Julia belonged to Nancy and complainants. Has heard Nancy say, when angry, that complainants should have the negro, but never heard McVay say that they should.

This is all the testimony. The vice-chancellor decreed one third part of the negroes to Murdock, and two thirds to the complainants; and Murdock appealed.

Davis, for appellant.

1. There is nothing in the case to warrant such a decree.

The complainants place their right to a recovery in this case upon the grounds that the negroes were purchased with the assets of the estate of Thomas Hughes, and the rents and profits of the land. Their rights, springing from this source, they will be confined to, since they have thus asserted them, and cannot be allowed to have a recovery for a different right.

Was the vice-chancellor warranted in the decree made by him? The testimony of John. W. Carney will not warrant it, because it presents a state of case different from the one embraced in the bill, and establishes beyond all controversy that the negro girl was purchased with the means of Nancy Hughes, means raised out of her own property and labor, to which she was entitled. By the laws of Alabama she was entitled to one third of the land as her dower, which one third in this instance would have embraced all the cleared land. She was also entitled to the labor of the children she was raising and educating, on her own land, and with her own means. Then take it for granted that the negro was purchased with the rents and profits of the land, and the labor of the complainants whom she was supporting and educating, the purchase is only shown to have been made with her means, and not the complainants, and that she had the right to make whatever disposition of her she pleased.

2. The current of the testimony shows the bill of sale was taken in the name of Nancy Hughes and her heirs, this is the usual manner of taking bills of sale, and cannot therefore argue anything against the defendants. Nor does the mere fact that

Murdock et al. v. Hughes et al.

the said Nancy was often heard to say that she intended the negro for her children by Hughes or any one else, make it obligatory on her to do so.

An effort has been made to make it appear that the \$200 obtained in South Carolina was applied to the payment of the note for that amount given to secure the last payment for the negro girl Julia; this the testimony of Carney shows to be untrue, while that of their other witnesses establish it to have been done. Whether so or not, is quite immaterial for the purposes of the complainant, as we establish by this same Carney, that the \$200 was a legacy to the said Nancy from her father, and consequently no part of the assets of Thomas Hughes, deceased.

When we examine the other side of this case, we find the answer of the said Nancy utterly denying every allegation in the complainants' bill. It is not pretended by the complainants, that these receipts were obtained from them by unfair means; how then do they undertake to say that a part of their means due to them as heirs and legatees went into the negro; had it have been so, they have receipted for the amount, because their receipts purport to be in full of all claims on account of said estate; until then it has been charged and shown that they did not know of the situation of the money which they say was applied to the payment of said negro girl; their receipt, being in full of all demands, must be final.

The testimony of Lancaster C. McVay and Hugh McVay fully establish the fact that John McVay did furnish some three hundred dollars of the money with which the negro was purchased, and that the residue was furnished by the said Nancy, out of her individual means.

Word and Walter, for appellees.

1. The proof clearly shows, that with the rents and profits of the real estate of said Thomas Hughes, deceased, Mrs. Hughes purchased the mother of the negroes now in dispute. This fund belonged to complainants, as heirs of Hughes, and any property purchased with it became in the hands of the guar-

dian trust estate, held for their use and benefit. They can either make defendant Nancy account for the rents and profits, or they can follow the property purchased with the same into the hands of any person having notice of the trust. 2 Kent, 188, and authorities there cited.

It is however urged, that some allegations in our bill show us not to be entitled to the relief sought, and that we cannot contradict our own statements. It is said, 1st, That the bill states that the negro Julia was bought with the funds of complainants, and that the bill of sale was taken to Mrs. Hughes and complainants, jointly. To this we answer, that Mrs. Hughes was guardian, that she purchased with the funds of her wards, and it is, under these circumstances, immaterial to whom, or how the bill of sale was made. The property is saddled with the trust, and cannot be defeated by any improper action of the guardian.

2. It is contended that the bill alleges, that at the time of the purchase we *agreed* with the defendant Nancy, that she should have the girl Julia and her increase, that the hire and labor of the negroes should be appropriated to the education and maintenance of complainants, and at the death of said Nancy, they should be divided between *said Nancy* and complainants. It is true that the bill is somewhat unartistically drawn as to this point, and yet it is equally true, that, if such contract did exist, still the same would be disregarded by this court. At the time of the purchase the oldest of complainants was eighteen years old, and the youngest six; and we feel satisfied that this court will not tolerate the odious doctrine, that guardians are permitted to make binding contracts with their infant wards, which are clearly injurious to the interests of the latter. It will also be recollected that complainants were very young at the time of purchase, and could not know or recollect the terms of the contract, and great indulgence will be extended to them in the statements of their case.

3. It is said that Mrs. Hughes ought to be allowed an account against her wards, for money expended in their education, &c. A guardian is not permitted to exceed the income of

his ward in his support, without an order of court. 1 Howard. The proof, however, shows that the estate of the wards was sufficient to purchase, in 1818, the negro girl, and from that time it became the property of complainants, and could not be sold or disposed of without the order of court to that effect. But it further appears that the rents and profits of the land were more than sufficient to support the wards and their guardian, and also that the guardian, from 1818 to 1825, enjoyed exclusively the rents and profits of the land. Complainants do not wish to make their guardian account for these rents and profits. They are willing to give these to their mother, but insist upon having the negroes purchased with their funds previous to 1818.

4. It is contended, again, that certain receipts, given by complainants, and filed with the answer, should bar them. They acknowledge the receipt of complainants' distributive share of the estate of Thomas Hughes, deceased; they are given to the administratrix, and in fact can be used by her to protect her as administratrix. And the proof shows this to be the case, for she held \$158 $\frac{7}{8}$, on settlement of her administration account, and the aggregate amount of the receipts filed is \$161. The slight difference between these sums, is occasioned, doubtless, by the accumulation of interest on the former amount whilst in the hands of the administratrix, before distribution made. There is not even a pretence that she ever settled her guardianship account. She does not allege it in her answer, and it is nowhere shown by the proof. The rents and profits of the real estate went into her hands as guardian, not as administratrix, and these receipts can be used to protect her in the latter, not in the former capacity. But even suppose the receipts did cover the whole property of the estate in the hands of defendant Nancy, both as administratrix and guardian, they then appear to have been given for a grossly inadequate consideration, and will be disregarded by this court. 1 Madd. Ch. 268; 3 P. Williams, 315, 316.

5. The statute of limitations is however plead. This defence is bad. The proof clearly shows that the negro Julia

Murdock et al. v. Hughes et al.

was purchased with the funds of complainants, by the defendant Nancy. She immediately became trustee as to this girl, and her increase, for her wards, the complainants. The statute does not run between trustee and *cestui que trust*. *Decouche et al. v. Savetier*, 3 Johns. Ch. R. 190; 3 Yer. 201; 2 Dessaus. 53; 1 Yer. 297; 3 Litt. 177; 4 Dessaus. 474.

6. But again, the deed of gift from McVay and wife, to the defendant, Mrs. Murdock, in 1825, was a fraud upon the rights of complainants, and the statute does not commence running until the fraud is discovered. 1 Madd. Ch. 256; 4 Dessaus. 474; 13 Viner, 542. The proof does not show that complainants had any knowledge of this deed of gift, previous to the death of McVay, in 1841, some two months before the commencement of this suit. The continued and repeated declarations of both McVay and the defendant Nancy, his wife, made from time to time, in the presence of complainants, that the negroes belonged to them; that the declarants had no right or title to the negroes; that no obstacle would be set up to the possession of complainants, after their death, were all calculated to lull complainants into a belief that the property was theirs, and to make them slumber upon their rights.

7. But suppose, for argument sake, that there existed no trust, that there was practised no fraud, still the bar is not perfect. The youngest of complainants did not attain age till 1833. Before the statute of limitations of Alabama could affect their claim, viz. in 1837, the defendants removed to Mississippi. Four years after this the bill was filed. The statute of Alabama did not bar the claim, nor did the statute of Mississippi. 3 How. 258, 264; 3 Johns. R. 263.

8. The appellees did not complain of the decree below, but as appellants have brought the case to this court; we now insist that this court should give that judgment which the court below should have given, the testimony being all taken, and no new fact to be ascertained. How. & Hutch. 532, sect. 9.

9. It is insisted that the purchase was made, as shown by the testimony, for the benefit of appellees, and with their funds, and instead of two-thirds of the slaves, the whole of them

Murdock et al. v. Hughes et al.

should be decreed to appellees. The decree of the court below seems to have been made under the impression that Mrs. Hughes, (now Mrs. Duke) had permitted the rents of her dower in trust to go towards the payment of the negroes. But the testimony shows that, in 1825, she sold her dower to her son, William Hughes, and that she used the proceeds in the purchase of a negro girl Mary. She is entitled to claim nothing on this score. And again, she was the guardian of complainants, (the present appellees) and should reap no benefit from confusing the rents of her dower with the rents of her wards. But the proof shows that she received full consideration for her dower; and in fact in her answer she does not set up any claim to dower, but merely says her dower was not set off to her. It is true it was not, but still she sold her dower interest to her son. Therefore the decree should be, for all the negroes to appellees.

Mr. Justice CLAYTON delivered the opinion of the court.

This bill was filed to recover certain slaves, upon the ground that they were purchased by the mother of the complainants, with money which properly belonged to them. It charges that the bill of sale for the slave, from whom all in controversy have descended, was made to their mother, and to the complainants, as heirs of Thomas Hughes, deceased. In another part the bill alleges, that "it was understood and agreed among all the parties, that their mother should have the slave during her life; and after her death to go to complainants." Alleges the loss of the bill of sale; the second marriage of their mother; and the conveyance of the slaves by the second husband, to the children of the second marriage. Complainants allege their ignorance of this conveyance, until shortly before the filing of the bill.

The answer denies every allegation of the bill, which could give countenance to the claim of the complainants.

The transaction took place in the state of Alabama, in the year 1818. A good deal of testimony has been taken, and, as might be expected after the lapse of so much time, a great deal

of contradiction is involved. Our belief from the evidence is, that half the money, or more, was paid with funds which justly belonged to complainants, and for which they have never received any compensation. This money was derived from the rent of their land. Their mother was administratrix of their father's estate, and the guardian of some of complainants; but she has not embraced these rents in her accounts. The answer alleges that the rents were expended in the education of the complainants, but there is no evidence in support of it. The account and receipts filed show, that the rents were never paid to complainants.

In regard to the title to the slave, the testimony is still more conflicting. The person who sold the slave, says he gave a bill of sale, but does not recollect its terms. He says farther, that their mother, at the time of the sale, told complainants, if they would help to pay for the negro woman, she should belong to them after her death. One witness says the bill of sale was made to the complainants; and several swear that they have heard the second husband disclaim all title to the negroes; and have heard her say, he should never have them. Several other witnesses prove the bill of sale was made to Mrs. Hughes and *her heirs*. The deed of gift from McVay, the second husband, to the children of the second marriage, bears date in 1825, and several witnesses swear the complainants knew of it, shortly after its execution. Murdock married the only surviving child of the second marriage. There is a plea of the statute of limitations, and this plea must decide the cause.

It does not appear that the mother ever qualified as the guardian of more than one of the children; and the purchase seems to have been made by her in her own right, not as guardian. If, therefore, any trust were created by the use of their funds, it was an implied trust, and not an express one. Continuing, express trusts form the only class protected from the operation of the statute.

But if there had been a direct and express trust, between the complainants and their mother, the relation was dissolved, when the slaves were conveyed to the children of the second

marriage. That was a virtual denial of the right of the complainants, and the assertion of an adversary claim. This was an abandonment of the fiduciary character, and the statute would commence running from that day, if the complainants were under no disability. The disabilities appear to have all been removed, in 1833, and this suit was not commenced till 1841. See *Kane v. Bloodgood*, 7 Johns. Ch.; *Armstrong v. Campbell*, 3 Yerg.; Angell on Lim. 171.

The only possible way to avoid the effect of the statute, would be to hold that the mother had a life-estate, with remainder to the complainants. The allegation in the bill is not direct or positive to this point, but is quite vague and indeterminate. The answer denies everything like it. There is no proof which establishes it in such a manner, as to make it the proper foundation of a decree.

This is probably a hard case upon the complainants, and they may have been treated with some injustice; but upon the proof made this court is not authorized to give them relief.

The decree will be reversed and the bill dismissed; but the complainants are to pay only one half of the costs in the court below, and the defendants the residue.

Decree reversed, and bill dismissed.

THOMAS N. FALCONER et al. *vs.* GEORGE FRAZIER.

In a suit at law by petition, under the mechanic's lien law, to subject alleged property of the defendant to the payment of an alleged mechanic lien in favor of the plaintiff, if the defendant be a non-resident, it is error to grant an order of publication against him, and on proof thereof to render a judgment by default against him; such judgment will be absolutely void for want of due notice.

Where a petition under the mechanic's lien law was filed against two persons, one of whom plead and the other made default, and judgment by default was rendered against the latter at one term, and judgment on the issue at the next term for a less sum was rendered against the other, it was *held* to be erroneous; as the plaintiff could not have in the same suit two distinct judgments for different sums.

In a petition under the mechanic's lien law, the title to the property sought to be subjected to the lien, cannot be brought in issue; an issue, therefore, tendered by the defendant to such a petition, that he was neither proprietor nor lessor of the premises, will be an immaterial one.

In a petition under the mechanic's lien law, nothing is affected by the judgment but the interest of the party to the record; if the party have no interest, the judgment will confer no lien; the lien will be confined to the actual interest; the rights of third persons not parties to the suit will remain as they were previously.

In error from the Adams circuit court; Hon. C. C. Cage, judge.

On the 12th of May, 1842, George Frazier filed his petition, under the mechanic's lien law of 1840, to recover the amount of \$970, from Thomas N. Falconer, for labor and materials furnished by him, as the petition alleges, and placed on property described in the petition as belonging to Falconer.

To this Falconer replied at that term, denying the petition generally, and averring, that he was neither the proprietor or lessor of the premises described. At that term, the cause was continued. At the fall term, 1842, the petitioner had leave to amend his petition, in order to make new parties, and also

had leave to take an order of publication against one of said new parties, a non-resident, Robert T. Hawes.

At the May term, 1843, the cause was continued. At the fall term, 1843, the suit was dismissed as to one of the new parties, Collins, and a judgment by default, with writ of inquiry awarded, taken against Hawes, the other new party, upon the proof of publication two months in a Natchez newspaper. A jury was at the same time empanelled, who returned a verdict against both Hawes and Falconer, for \$1121 97, and the court entered up judgment against them both for that sum. After the judgment by default had been executed, counsel for Hawes appeared and filed an affidavit of merits, and asked to have the judgment set aside, and for leave to plead for Hawes; Falconer at the same time moved for a new trial, which was granted as to Falconer, but the motion by Hawes was refused. At the May term, 1844, Frazier filed his replication to the answer of Falconer, to the *original* petition, and upon that issue joined the cause was submitted to the jury. A verdict was then rendered against Falconer alone for \$1159. Both in the joint judgment rendered in 1843 and in the last rendered, a lien was embraced in the judgment, as sought by the petition.

The court instructed the jury at the last trial, on behalf of petitioner, "that possession and occupation of the premises in question by defendant Falconer, when the work was done, and at the commencement of this suit, are sufficient, as between plaintiff and defendant, to warrant a presumption of ownership by defendant." The defendant's counsel below, excepted to the opinion of the court in giving this instruction, and after verdict, moved for a new trial; this was overruled, to which defendant's counsel also excepted. Exceptions were also taken to the refusal to set aside the first judgment in the fall of 1843, against Hawes.

The defendants brought the case to this court by writ of error.

Hewett, for plaintiff in error.

1. The prominent error of the case is, the attempt to charge

Hawes with notice by publication in the newspaper. It has been settled in this court, that "no court can legally proceed to judgment, unless it has jurisdiction over the person, as well as the subject-matter;" and that "jurisdiction over the person does not attach, unless he be actually, or constructively in court." 6 How. R. 509.

"By the service of process, the defendant is considered in court, and the court may proceed to judgment." Ibid.

In our country, we admit, the "actual presence" is not requisite in order that the court may proceed legally to judgment. A constructive notice is alone necessary; "our courts acquire jurisdiction by the *service* of the process merely." Ibid. And how that service shall be had, see How. & Hutch. 583, § 27.

It is also true that in some cases, the subjects of special legislation, provision has been made, that in the case of non-resident defendants, proof of publication in a newspaper, for a specified time, shall give the benefits of an actual service of process. As in the attachment law, How. & Hutch. 552, sect. 20, 21. Also in relation to proceedings against non-residents in the chancery court, How. & Hutch. 510, sect. 24. But the fact of such special provision, in special cases, shows that the legislature deemed it necessary to provide, by express enactment, for any deviation from the general principles in regard to service of process. The mechanic's lien law of 1840 evidently contemplates no such mode of bringing a defendant within the jurisdiction of the court. Courts cannot add a provision to a statute, not placed there by the enacting power, or give it a construction not required to effect the purposes intended by the legislature. 1 Call's R. 411; Peck, 418.

The statute expressly restricts the lien contemplated to cases of contract between "the proprietor or proprietors, the lessor or lessors" of the property improved, and the mechanic.

2. It was however contended, in the court below, that this proceeding assimilated itself to, if it was not in fact, a chancery proceeding. And that the rules of chancery practice would be resorted to by the court.

In 7 How. R. 140, this court remark, "that the whole lan-

VOL. VII. 21

guage of the statute distinctly stamps upon the proceeding the character of a remedy at law." "That where the contract has not been recorded, the remedy is intended to be at law; and that no further change was intended to be introduced, than to substitute for the ordinary declaration, a petition in which the nature of the lien claimed should be set out."

The court erred in setting the joint judgment as to Falconer aside, and refusing to do so as to Hawes. The verdict of a jury on the judgment of a court must stand or fall *in toto*. It is a unit. Having rendered it against those defendants jointly, to set it aside as to one, was to render it null as to the other.

4. At the new trial in the spring of 1844, by taking a judgment against Falconer, and neither dismissing, or in any other way disposing of the cause as to Hawes, another error was committed.

5. By creating or attempting to create a lien on the property named in the petition, upon both these judgments, another error was perpetrated. The petition originally charged Falconer as the proprietor. The amended petition charged Hawes as proprietor, and liable through the agency of Falconer, his attorney in fact. Falconer answers, denying the petition, issue is joined by petitioner, and yet without one tittle of evidence to sustain the petition as to the ownership of the property, a judgment is rendered, with lien. At the same time that this judgment is rendered against Falconer as the principal, and proprietor, the court below insist that the previous judgment taken against Hawes as proprietor, and upon the assumption that this Falconer was his attorney in fact, shall also be continued in force as a lien on the same property.

6. In the instructions to the jury, the court erred. As we have seen, the right of this peculiar remedy does not exist, except against those who are the proprietors or lessors of the property. If then the petitioner undertook to prove the affirmation, as he did here, by notice given, he could have compelled the production of any papers he required, possessed by the defendants, or given secondary evidence of their contents, if not produced.

He did neither, nor did he prove, or attempt to prove anything but what might be proved in regard to scores of tenants in the same city. The principle asserted by the court below might be admitted, if by the verdict and judgment it had been only intended to affect the property of Falconer generally; but when it is proposed to give thereby a specific lien on a particular piece of property, and make it liable to the consequences of Falconer's engagements, such evidence of property in the premises, as the instructions contemplate, is unknown to the court, and would be destructive to the interests of society.

Davis and *Cox*, for defendant in error.

1. When a verdict has been found for plaintiff, even against evidence, after an unconscionable defence has been set up, a new trial will not be granted. *Graham's Prac.* 631, 632; 1 *Bun.* 11; 2 *B. & C.* 357. Besides the court must be satisfied that there are strong probable grounds to suppose that the merits have not been fully and fairly discussed, and that the decision is not agreeable to the justice and truth of the case, before they will grant a new trial. *Graham's Prac.* 632; 3 *Bl. Com.* 392; 6 *T. R.* 638; 4 *D. & R.* 243.

2. It is a well settled principle that a party cannot take advantage of his own wrong. The plaintiffs in error now seek to avail themselves of the error committed by the court below, in refusing to set aside the judgment (first rendered) as to *Hawes*, on the ground that a new trial cannot be granted at the instance of one of several defendants, as the verdict must stand or fall *in toto*. *Bul. N. P.* 326; *Graham's Prac.* 636. Yet it cannot avail the party benefited by the same. After a writ of inquiry shall be executed and judgment rendered thereon by the court, the same shall not be set aside, unless good cause be shown therefor. *How. & Hutch.* 636, sect. 9; 5 *Johns.* 355; *Graham's Prac.* 292.

It is discretionary, it seems, in the court to set aside a judgment by default or not. *Graham's Prac.* 788; 2 *St.* 1242. *Quære*, therefore if a refusal so to do is ground of error.

The statute providing that a refusal to grant a new trial,

may, upon reducing the evidence, &c. to writing, be assigned as matter of error, would seem to embrace only cases wherein there has been actually a trial, and not to extend to judgments by default, and writs of inquiry executed. How. & Hutch. 493, sect. 52.

3. The instruction is both in the language and spirit of 12 Wend. 375, and 2 How. 874, *Buck v. Brian*.

4. The term proprietor in the statute does not alter the rule of evidence. It does not require the same strictness of proof as in an action of ejectment. It would not be competent for a defendant in a petition under the mechanic's lien, to defeat the claim under pretence of defective title, when to all appearance he was the actual owner of the property. Such a doctrine would be at war with the principle that allows no man to derive benefit from his own wrong. The objection, if it lie at all, must come from third persons by way of intervention.

5. The mechanic's lien law is a remedial statute, securing to the laborer a compensation for his time and materials. It is an improvement upon the civil law doctrine of accession, which placed in some respects the furnisher of materials, or the artisan, upon a property platform with the owner of the chattel; it is an amendment to all the acts previously enacted upon the same subject.

The form in which the lien is to be judicially enforced is not by technical common law declaration, but by petition or bill, describing simply, with common certainty (as in chancery proceedings) the property and the contract. In its decision the court is required to render judgment according to the justice of the case. Upon the judgment so rendered there is issued a general execution against the goods and chattels, lands, &c., of defendant, but a special execution against the special property. In all respects the proceeding is akin to a foreclosure of mortgage.

It would seem therefore, that the notice might be given either by law or chancery process; both require, when it can be had, actual service, but when this is impracticable the latter allows notice by publication. Surely to prevent a failure of

justice, the court would interpret the statute in an equitable spirit.

The intention of the legislature is not to be collected from any particular expression, but from a general view of the whole of an act of parliament. 3 Bing. 196, per Best, C. J.

In construing acts of parliament, judges are to look at the language of the whole act, and if they find in any particular clause an expression not so large and extensive in its import as those used in other parts of the act, and upon a view of the whole, they can collect from the more large and extensive expressions used in other parts, the real intention of the legislature, it is their duty to give effect to the large expression. 7 B. & C. 643, per Lord Tenterden.

In statutes incidents are always supplied by intendment; in other words, whenever a power is given by a statute, everything necessary to the making of it effectual, is given by implication; for the maxim is *Quando lex aliquid concedit concedere videtur et id per quod dentur ad illud*. 2 Inst. 306, 12 R. 130, 131; Dwarris on Stat. 23.

It is by no means unusual, in construing a remedial statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief. 2 Y. & J. 196; Dwarris on Stat. 67.

It is held that in the case of a remedial statute, everything is to be done in advancement of the remedy that can be given consistently with any construction that can be put upon it. 3 Dow. 15; Cowp. 391; Dwarris on Stat. 78.

A remedial act shall be so construed as most effectually to meet the beneficial end in view; and to prevent a failure of the remedy, as a general rule a remedial statute ought to be construed liberally; receiving an equitable or rather a benignant interpretation. The letter of the act will be sometimes enlarged, sometimes restrained, and sometimes it has been said, the construction made is contrary to the letter. Dwarris on Stat. 57.

Statutes are extended by construction to other cases, also to other persons, also to other places, and also to other times. Dwarris on Stat. 57, 58, 59, 60, 61.

Mr. Justice CLAYTON, delivered the opinion of the court.

Frazier filed his petition in the circuit court of Adams county, under the mechanic's lien law, to subject a certain lot in the city of Natchez to the payment of a debt due to him as a mechanic. Falconer, who was then the only defendant, filed an answer in which he denied that he was either the lessor or proprietor of the lot in question. Frazier then, by leave of the court, amended his petition and made one Robert T. Hawes a defendant. An affidavit was filed, that Hawes was a non-resident, and an order of publication was made against him. At the November term, 1843, upon proof that publication had been made, a judgment by default was entered against Hawes. Up to the time of this judgment, there had been no appearance upon the part of Hawes, either in person or by attorney; — after the judgment by default, but at the same term, counsel appeared and moved to set it aside and to plead. The proceeding in the case was at law, the suit was brought and conducted throughout as a common-law suit. After the judgment by default, a jury was empanelled to assess the damages, who did assess them against both the defendants jointly.

The statute does not authorize a proceeding by publication in a case of this kind. Unless in certain excepted cases, made so by statute, a judgment without service of process, or that which is regarded as equivalent, cannot be sustained. This case does not fall within any of the exceptions. The judgment by default, therefore, should not have been rendered. It was a nullity for want of proper notice. The motion to set it aside and for leave to plead, should have been granted; and it is now accordingly directed to be done.

In regard to the other defendant, Falconer. After the verdict above referred to, and a final judgment as to both defendants, a new trial was granted to him. At a subsequent term this trial was had, and after verdict another judgment, for a different sum, was entered against him, so that the plaintiff in the same suit has two distinct judgments for different sums. This was also erroneous. See 2 How. 805; 7 How. 304. The judgment must therefore be reversed as to both defendants, and the cause remanded.

The defendant Falconer filed a plea putting in issue the fact that he was the proprietor or lessor of the premises on which the building was erected or repaired. The statute does not contemplate the trial of such an issue in this form of proceeding. Nothing can be affected by the judgment, except the interest of the party to the record. If the party have no interest, the judgment will confer no lien. The lien will be confined to the actual interest. The rights of third persons, not parties to the suit, remain as they were previously. We regard the issue as tendered by that plea therefore as wholly immaterial.

Judgment reversed, cause remanded, and new trial awarded.

ROBERT C. HEAVERIN *vs.* JOHN O. DONNELL.

Where A. draws a bill on B. in favor of C., and B. accepts the bill in writing, and is sued upon it, he cannot show by parol evidence that the acceptance of the bill of exchange was given to C. to be obligatory, upon condition that A. finished a job of work that he had undertaken for B. The acceptance is an absolute contract to pay, and it cannot therefore be shown, by parol, that it was not absolute.

Where a bill of exchange was described in the declaration, as dated on the 7th day of December, A. D. 1840, at Natchez, drawn by Patrick Burke on and accepted by Robert C. Heaverin in favor of John O. Donnell, for the sum of ninety dollars, and a deposition spoke of a bill drawn by Patrick Burke in favor of John O. Donnell on the said Robert C. Heaverin, in the fall or winter of 1840, for ninety dollars, but did not give the precise date; *held*, that the deposition did not sufficiently identify the bill sued upon, with the one respecting which the witness testified.

IN error from the Adams circuit court; Hon. C. C. Cage, judge.

John O. Donnell filed his declaration in the court below, against Robert C. Heaverin, as acceptor of a bill of exchange. A copy of the bill is not set out in the record; the declaration describes it in these words: "For that whereas one Patrick Burke heretofore, to wit, on the 7th day of December, A. D. 1840, at Natchez, to wit, at the county aforesaid, made his certain bill of exchange, in writing, bearing date the day and year aforesaid, and then and there directed said bill of exchange to the said Heaverin, (by the name of Everin,) and thereby then and there requested the said defendant to pay the said plaintiff the sum of ninety dollars, and then and there delivered the said bill of exchange to the said plaintiff, which said bill of exchange afterwards, to wit, &c. the said defendant accepted, in writing, by the name and signature of R. C. Heaverin."

The defendant plead non assumpsit; and on the trial offered

Heaverin v. Donnell.

the deposition of one Hallock, as follows: viz. "Deponent says he was present when Mr. O. Donnell called Mr. Heaverin in, and presented him an order drawn by Patrick Burke in favor of said O. Donnell for ninety dollars, and requested the said Heaverin to accept the same. Mr. Heaverin replied to him that he would be owing the said Burke that amount of money, when said Burke had finished a certain job of work which he had undertaken to finish for said Heaverin. Witness says that said Burke was at that time filling up a lot under the hill for said Heaverin. Mr. O. Donnell said he wanted to stop the money in Mr. Heaverin's hands, as said Burke was owing him, and he was fearful that he would get his pay before the work was finished, and he, O. Donnell, should lose the debt; Mr. Heaverin said he would pay the order, provided the work was finished. The parties, plaintiff and defendant, both appeared to be satisfied with the statement of said Heaverin. Witness says, from what he understood at the time, Heaverin was not then indebted to said Burke; witness says this took place in the fall or winter of 1840. Cross-examined. The deponent says he does not know that the order sued on is the same as the one presented by O. Donnell to Mr. Heaverin. Deponent says he saw the defendant write his name on the back of the order presented.

The court below, on motion of the plaintiff's counsel, refused to permit the deposition to be read to the jury, and the defendant excepted.

The jury found for the plaintiff, and the court refusing to grant a new trial, the defendant sued out this writ of error.

Hewett, for plaintiff in error, contended,

1. That the deposition tended to prove failure of consideration, which was admissible under the general issue. *Brewer v. Harris*, 2 S. & M. 88.

2. That it was competent for Heaverin to impeach the consideration of the bill of exchange in the hands of O. Donnell, who had not taken the order in the usual course of trade. *Coddington v. Bay*, 20 Johns. 637; 12 Wend. R. 600; *McMurrin v. Soria*, 4 How. 154.

3. That the acceptance of Heaverin was "in blank," and it would have been a fraud in O. Donnell to have filled it up with an absolute acceptance; and being "in blank," it was competent for Heaverin to prove the conditions on which it was accepted. Chit. on Bills, 332.

Sanders and Price, for defendant in error.

The deposition of Hallock attempts to show that the acceptance was conditional, but whether of this or some other draft he does not know; no one shows that the supposed conditions of the acceptance had not in fact taken place. But all other objections to the deposition, its not being sworn to, &c. out of the way, we deny the competency of such testimony to explain a written contract, or acceptance. See Greenl. on Ev. 315, to 324, particularly § 281, and the authorities there cited. This court has also decided, that to constitute error in ruling out testimony, its relevancy must appear.

If this position is correct, there is clearly nothing in the other grounds. This is a little case, involving a little sum of money, and has been delayed by little expedients, for five years. The order was given to a laborer for his wages.

Thomas Reed, on the same side.

1. Is the evidence sufficient to change the liability on a negotiable instrument of this description? We think not. There is not sufficient certainty in this evidence to charge any undertaking whatever, much less to change the liability of the party in this action, who, as it appears, had made an acceptance of the draft sued on in writing.

2. The witness does not say that the plaintiff used the language said to have been used with reference to the acceptance at the time he wrote his name across the back or face of the draft.

3. This testimony was wholly irrelevant, as the draft exhibited the acceptance, and the pleading admitted the acceptance of the draft by the defendant.

4. The deposition ought not to have been admitted, because

that the evidence sought to be admitted was parol proof of a condition made by the plaintiff at the time he made the acceptance. Chit. on Con. 81, 82, 83; Bay. on Bills, 523, and notes; 11 Mass. R. 27; 7 Pick. R. 29; *Renner v. Bank of Columbia*, 9 Wheat. R. 587.

The law-writers lay down the rule upon very broad terms with regard to the admissibility of parol evidence to attack or change written instruments. There must be a defect, and that defect must be a "patent" one, and not "latent." Parol evidence is not permitted to explain a writing or agreement, deed, or other instrument, unless upon the face thereof there appears some patent ambiguity. See *Gildartison v. Howell*, 1 How. 198; *Fitzhugh v. Runyon*, 8 Johns. R. 375; *Johnson v. Still*, 11 Ib. 201; *Parsons v. Miller*, 15 Wend. 561; Chit. on Con. 80; 1 Phil. Ev. Cow. & Hill's notes, 547, 555.

In the case of *Creecy v. Holly*, 14 Wend. Rep. 26, the court held that parol evidence was inadmissible to change or alter the contract made by bill of lading. How much more guarded then should the courts be in admitting evidence.

Mr. Justice THACHER delivered the opinion of the court.

This action was instituted against the defendant as the acceptor of a bill of exchange. Upon the trial, and after the production of the bill declared on, the acceptance of which was not denied by the defendant, the defendant offered to read in evidence a deposition which went to show that the acceptance was given to the plaintiff upon a condition that the drawer finished a job of work which he had undertaken for the acceptor. The probable object of the introduction of the deposition was to take the first step in attacking the consideration for which the acceptance was given; and a failure of consideration may be proved by parol. But in laying this foundation, it was necessary to reach back to the prime contract in writing, which was explicit in its terms, and free from ambiguity, and could not, therefore, by the long established rules of evidence, be thus approached. The contract *to pay* as acceptor was in writing, and therefore could not be changed by parol; the deposition

Heaverin v. Donnell.

went to show that there was not a positive agreement to pay as acceptor, and therefore, being parol testimony, was not admissible. 14 Mass. 154 ; 1 Cow. 249 ; 7 Mass. 518. Moreover, in respect to this case, the deposition does not sufficiently identify the bill sued upon in the action with the one respecting which the defendant speaks.

Judgment affirmed.

ROBERT HAIRSTON vs. RICHARD F. FRANCHER.

Cases brought from justices of the peace into the circuit court, may be tried in the latter court without any written pleadings whatever.

An overseer of roads cannot maintain an action before a justice of the peace, against a person for obstructing the highway, unless he has first obtained a judgment of the board of police against the obstructor under the statute (H. & H. 450, § 29, and 453, § 41,) which makes it the duty of the overseer of roads to remove all obstructions upon roads, and charge the expense thereof to the offenders, and to report the number of days of the obstruction and the expense of removal, to the board of police, which was authorized to enter judgment thereon; which judgment, if for an amount less than fifty dollars, was recoverable by suit before a justice of the peace.

In error from the Lowndes circuit court; Hon. Hendley S. Bennett, judge.

Richard F. Francher had a warrant issued from a justice of the peace against Robert Hairston, to recover damages for obstructing a public highway; the justice gave judgment against Hairston for three days' obstruction, six dollars and costs, which amounted to \$43 50. Hairston appealed to the circuit court, where a trial before a jury was had, who found a verdict also against Hairston.

No pleadings are set out in the record; nothing appears but the submission to the jury, the judgment and the bill of exceptions. The latter recites that the defendant plead the general issue in the circuit court; but it is not in the record. The evidence adduced on the trial was in substance as follows: Francher read the transcript of the records of the board of police of the county of Lowndes, state of Mississippi, laying out and establishing the road alleged to be obstructed; the appointment of himself as overseer of the road. He then proved by witnesses, that Hairston admitted, on the trial before the justice of the peace, that he had put up his fence across the road, and said

that he would put it up as often as he pleased ; and that the fence of Hairston, prior to the institution of the suit, had been erected across the road for as many as three days.

On this testimony Hairston asked the court to instruct the jury,

1. That if the jury shall believe, from the evidence, that the subject-matter of this suit was for obstructing a public highway, Richard Francher, the appellee, had no such interest in the subject-matter of the suit as enabled him to bring or sustain the same, and they must find a verdict for the appellant, Robert Hairston.

2. That if the jury shall believe, from the evidence, that the obstruction of the road or highway, sued for by appellee, was the obstruction of a public highway, said Francher cannot bring or sustain this action therefor ; and further, said justice of the peace had no jurisdiction of the cause, and they must find for the appellant, Robert Hairston.

3. That the law is, that the obstruction of a public road is a public nuisance, for which the board of police may enter up a fine or judgment of \$2 for every twenty-four hours' obstruction ; but that appellee, Richard Francher, had no right to make any such charge, or to bring or sustain any such suit, either in his individual capacity or as overseer of the road ; and if the jury shall believe, from the evidence, that the obstruction sued for was such a nuisance, appellee, Richard Francher, cannot bring or sustain his action therefor ; and they must find for the appellant, Robert Hairston.

4. That the law is, that the justice of the peace had no jurisdiction of the cause, and this court has no jurisdiction of it, and the jury must find for the appellant, Robert Hairston.

The court refused to give the charges, on the ground that the objections ought to have been taken by demurrer. After the verdict for Francher, a motion was made by Hairston for a new trial, which was refused, and this writ of error prosecuted.

Evans, for plaintiff in error.

The statute is as follows, to wit : — " If any person shall fell any bush or tree into any public highway, or obstruct the same

in any manner whatever, and shall not remove the same within twenty-four hours, it shall be deemed a nuisance, and every person, so offending, shall forfeit and pay two dollars for every twenty-four hours such obstruction shall so remain, and the overseer of the district, when such may be, is hereby required to remove the same, and charge the same to such offender, and also return the number of days such obstruction so remained across said public road, to the board of police, who may pass judgment, not only for the charges paid by the overseer, but for the number of the days the offender suffered such obstruction to remain unremoved." H. & H. 450, § 29.

1. It is evident that Francher had no right to sue for a violation of this statute. It is an offence against the public, and of course, an individual has no right of action. Every person in the state has the same right to sue that Francher claims; but the evidence shows that Francher was overseer of the road obstructed. This, however, does not help the case. He does not sue as an overseer, and he cannot sue in that capacity any more than he can as an individual. He cannot, as overseer, go beyond the power conferred by the statute. By this, his duty is to remove the obstruction, and charge the same to the offender, and to return the charge so made, and also the number of days such obstruction so remained across the road, to the board of police. Here his duty ends. He is not permitted to sue for even the charge made for removing the obstruction, and much less for the penalty of two dollars per twenty-four hours such obstruction remained. See H. & H. 452, § 38. It is made the duty of the board of police to impose this fine, as it is made their duty to pass judgment for the obstruction of a highway in the statute first above quoted. By reference to § 39, page 453, of H. & H. it will be seen that the fines and forfeitures under the act are to be recovered in the name of the president of the board of police.

2. The court below admitted the charges to be law, and that neither the justice nor the circuit court had jurisdiction, but was of opinion that the charge could not be given, because Hairston did not demur. For a public nuisance such as the one sued for,

Francher could not sue in any court. No jurisdiction whatever could take cognizance of Francher's cause; yet in the court below the omission to demur gave jurisdiction. In *Latham v. Edgarton*, 9 Cow. 227, it is said, "Though the parties appear and proceed to trial, without raising the objection, and the court, in fact, hear, try, and give judgment, and though the judgment be against the party succeeding before the justice, who pays it, yet it is not to be regarded as of any effect whatever when there is a want of jurisdiction. And in the same case, page 229, it is said that even after trial the court is bound to dismiss the cause on motion. See 1 Humph. 332.

3. When there is a total want of jurisdiction it may be pleaded in bar, or given in evidence under the general issue. The true rule is laid down in *Graham's Practice*, page 224, as follows, to wit: "This is an objection which it is, in general, unnecessary to plead, for if a want of jurisdiction appear in any stage of the cause, the plaintiff must fail. It has, however, been said, that after pleading a plea in bar it was too late to except to the jurisdiction of the court. 3 Johns. 105. This rule, it is true, prevails to a certain extent, but its operation is extremely limited, and it is confined almost exclusively to those cases in which a defendant, by reason of some local or personal exemption, is privileged from being sued, except in a particular place, or court."

"In an inferior court, if the fact of jurisdiction be alleged, but not proved, the plaintiff ought to be nonsuited on the general issue, and if the inferior court admit the jurisdiction, a bill of exceptions may be tendered. 1 Chitty Pl. 442, 476; Gilbert C. P. 188, 189; 1 Saund. Pl. and Ev. 98, n. 1.

"When the subject-matter of the plea is that the plaintiff cannot at any time sustain his action, it must be in bar." 1 Chitty, 481. See, to the same effect, 1 Chitty, 474, note b.; 6 East, 583; 3 Mass. R. 124; 4 T. R. 503.

Hains and Harrison, for defendant in error.

1. The charges requested were not properly the subject-matter of instructions for the jury. All the facts stated in them were set out upon the record, as constituting the right of action itself.

They were alleged affirmatively, by the pleadings, and were the very foundation of the suit. Francher sued in his own name, in the capacity of overseer of the road, for the obstruction of a public highway, and before a justice of the peace. This was the case made by the pleadings, and if the facts thus set out did not give jurisdiction, advantage should have been taken of it in a different way. After pleading the general issue, the only way in which the question of jurisdiction could be brought before the jury, would be by new matter of evidence.

2. The first and third charges amount in substance to this, that if the jury shall believe that the plaintiff is to be believed, when he states that he sues as overseer for the obstruction of a public highway, then he had no right to bring or sustain such a suit, and they "must find for the defendant." In other words, if the case made is proved, the jury must find that the plaintiff had no right either to bring or sustain it; and inasmuch as he did prove it, they must find for the defendant. The defendant takes issue upon the facts, and because the plaintiff proves all that he undertook to prove, and nothing more, the defendant is entitled to a general finding in his favor!

3. As to jurisdiction, and the right of the overseer to sue in the manner he did. If this be a case of "fine or forfeiture,"—and in all cases of fine or forfeiture the same may be sued for and recovered before a justice of the peace, in the name of the person suing for the same,—it follows that the court had jurisdiction, and that the suit was properly brought. The latter part of the section, (29) which requires the overseer of the road to remove the obstruction and charge the expenses to the offender, and return the offender to the police court, "who may pass judgment, not only for the charges paid," but for the number of days the obstruction was permitted to remain, does not take away the jurisdiction of the justices of the peace. At most, the remedy would be cumulative. Besides, justices of the peace have general jurisdiction over the amount in controversy, which has not been taken away.

4. The amount in controversy is six dollars, and the record shows that Hairston declared that he had obstructed the road, and

would do it again as often as he pleased. Francher was forced by law to accept the appointment of overseer, or be fined. He was also subject to be indicted, if he did not do his duty. If, therefore, the doctrine of "*de minimis non curat lex*," is of any avail, it ought to be made to apply to such cases as this. *Ex parte Bailey*, 2 Cowen, 483; *McCrow v. Hull*, 1 Burrow, 11; *Ib.* 57; *Fleming v. Gilbert*, 3 Johns. R. 483; *Hyat v. Wood*, *Ib.* 239; 7 Amer. Com. L. Rep. 125; 5 Johns. 137; 6 *Ib.* 270; 8 *Ib.* 369; 1 Johns. Cases, 255; 3 Verm. 73; 2 Bay, 126.

"The play should be worth the candle." The legal costs, and the time of the witnesses, and of the parties, and of the court, should be considered. *Smith v. Surber*, 2 Marsh. 50.

Mr. Justice THACHER delivered the opinion of the court.

Francher instituted an action before a justice of the peace against Hairston for obstructing the highway. Upon judgment for the plaintiff below, before the justice, Hairston appealed to the circuit court. In that court there appears to have been no pleadings by the parties, with the exception that the record states that the defendant "plead the general issue." Upon the trial the defendant below prayed the court to instruct the jury that the cause was *coram non judice*, and that the defendant was entitled to a verdict in his favor. It appeared upon the trial that the plaintiff below was an overseer of the roads. There was no evidence of a judgment against the defendant below by the board of police.

The statute makes it the duty of the overseers of roads to remove all obstructions upon roads, and charge the expense thereof to the offenders, and to report the number of days of the obstruction and the expenses of removal, to the board of police, which board is authorized to enter judgment thereon, subject to an appeal to the circuit court. How. & Hutch. 450, § 29; and 453, § 41. The judgment of the board, if for an amount less than fifty dollars, is recoverable by suit before a justice of the peace.

The statement in the record, that the defendant below plead the general issue, is contradicted by the record itself. There were no pleadings in the record to which an issue could be filed. There was no declaration. The plea of general issue amounted

Hairston v. Francher.

merely to a consent to go to trial. There being no occasion for pleadings in writing, in cases of appeal from a justice of the peace, the character of the party suing could be shown in evidence. An overseer of roads may institute such a suit, but to entitle him to recover in the action he must show, by competent evidence, that a judgment for the amount he seeks to recover, has been first entered up against his defendant, by the board of police. This is the foundation of his right of action. Such evidence not having been produced upon the trial of this cause, the judgment must be reversed, and a new trial granted.

WILLIAM VICK *vs.* THOMAS G. PERCY et al.

In cases free from fraud, a purchaser of land who is in possession, cannot have relief in chancery against his contract to pay, on the mere ground of a defect of title, without a previous eviction.

A vendee, in possession under a deed with warranty, with no fraud made manifest, and with nothing to show that the vendor is not able to pay any damages that may be recovered against him, has no right to call his vendor into a court of equity to litigate an adverse legal title; he must rely on his covenants, if he should be evicted.

On appeal from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

William Vick states, in his bill, that in the year 1838, he purchased of one Thomas G. Percy, then of the state of Alabama, a tract of land in Bolivar county, known as the 4th section of township No. 21, of range No. 8 west, containing 812 acres, and in payment gave him 480 acres of land in Washington county, valued at fifteen dollars per acre, and three notes of six thousand dollars each, payable in one, two, and three years from date; that he received a deed, and made a deed of trust on said 4th section to secure the payment of the notes. That the wife of Percy being then in Alabama, he gave his penal bond in ten thousand dollars to procure her relinquishment of dower, which he had failed to do. That Percy was dead, and his estate insolvent, or so nearly so as to be unable to pay the bond. That after he had paid the first of the notes he discovered that Percy had no title to said section, though he represented to complainant that he had a good and perfect title. That the same had been sold, prior to the sale by Percy, as government land, and purchased by Walker and Bernard, to whom a patent had been since issued, and that after the sale by Percy, the land had been sold by the sheriff of Bolivar county as the land of Walker (to whom Bernard had sold his interest,) and purchased by one

W. C. Damoss. That Percy had died, and that his wife, combining with the trustee, had induced him to advertise the land; the bill prayed for an injunction and rescission of the contract.

Maria Percy, widow and executrix of Thomas G. Percy, and Charles B. Percy, and John W. Percy, adult heirs of Thomas G. Percy, answer:—

They admit the contract for the purchase of the 4th section by Vick of Percy, and the mode and time of payment therefor, as stated in the bill. Mrs. Percy renounces and disclaims all right of dower in said 4th section, and files and tenders to the complainant a duly certified deed for her dower therein. The defendants deny the insolvency of the estate of Percy, and aver it is most ample and sufficient to discharge every demand that can come against it, and leave a large residuum for his representatives. That before the sale by Percy to Vick, every fact and circumstance relating to and in any manner connected with the title of said Percy, and the color of title of said Walker, or of Walker and Bernard, was fully made known to the complainant by Percy, and by complainant understood; that it was distinctly agreed and stipulated between them, that the complainant should not, at any time, set up the color of title of Walker as a reason for delaying the payment of said notes; that, as complainant was then fully satisfied with the title of Percy, after being informed of all the facts, the writings should be so drawn as to preclude the complainant from setting up Walker's pretence of title as a means of delay or ground of defence, and that the attorney applied to on that occasion, a Mr. Blanchard, of Vicksburg, being of the opinion that the complainant would be thus precluded by inserting in the notes "without plea or defalcation," they were drawn and executed in that peculiar phraseology for that purpose. They admit that Percy represented his title as good and perfect. He entertained that opinion and acted on it, in this contract in good faith and rightfully. They then set out his title, viz.:

An act of congress of the 29th of May, 1830, entitled "an act for the relief of the heirs of Col. John Ellis, deceased," which

permitted them to enter, without the payment of any consideration therefor, one section of the public land according to the surveys theretofore made, in the state of Mississippi, and that a patent should issue to them therefor by the proper authority, provided that previous to the issuance of said patent they should file with the commissioner of the general land-office a deed, relinquishing to the United States all claim to a tract of land of like quantity, for which a certificate had been issued to their ancestor on the 18th day of September, 1815, by the commissioners under the act confirming claims to land in the Mississippi territory. Under this act the said 4th section, being one entire section according to the public surveys made before the passage of the act, was duly entered, and the deed of relinquishment being made, the patent issued therefor on the 9th day of May, in the year 1833. The heirs of Col. Ellis were Thomas G. Ellis and Mary Jane Ellis, the latter of whom intermarried with Rene La Roche, of Philadelphia. The land was sold by them to Percy, and the conveyance on the part of La Roche and wife was made for them by Nathaniel A. Ware, by virtue of a power of attorney duly recorded in Adams county; the land having fallen to them upon a division of the estate of Col. Ellis.

That Long, after the said patent had issued to Walker, by means unknown to the defendants, procured the register of public lands at Chocchuma, to expose said section to sale as lands of the United States, and at said sale Walker, or Walker and Bernard, became the purchaser or purchasers thereof, with knowledge that the same land had been previously entered by the heirs of Ellis, under the act of congress. A patent was issued to him or to them, after delay, in 1836.

That both claims were fully made known to, and were distinctly understood by complainant before his purchase, and that complainant, with such knowledge, made the purchase, received the deed of Percy, entered upon and took possession of the land, and has thence hitherto fully enjoyed the same. They admit the sale of the land by the sheriff, and its purchase by Demoss. And after stating their inability to take any step to quiet the com-

plainant's title, they conclude by denying there is any equity in his bill, and praying dissolution of injunction, &c.

Pending a motion for a dissolution of the injunction, the complainant, on affidavit, filed an amended bill. It states, in substance, that while complainant and Percy were in treaty about the purchase of said 4th section, Percy represented his title to be perfect and complete; that he claimed under the heirs of Col. Ellis, to whom a patent had issued, after the performance on their part of every stipulation required by the act, and they exhibit a letter from Percy to prove this. In this letter Percy says: "I am in receipt of your letter of the 5th instant containing an offer for the 4th section. I accede to your proposition with *one exception*. I am unwilling to make a warrantee deed, but will convey to you my title as it stands. I am willing to give you what is called a quit-claim; warranting you against the heirs of Ellis, and all claiming under them. My determination not to warrant against the title of Walker and Bernard, arises from no diffidence I entertain of the success of my title, which I esteem to be as complete as any the government of the United States ever made; but because I shall be unwilling, after parting with all interest in the land, to be plagued with any action they may choose to institute. On this account only I agree to take your price, which I consider low." Percy then states briefly the facts constituting his title, and then argues the question of its validity, and adds, "It is unnecessary to argue this question; I have the fullest confidence in the absolute validity of the title I offer you; but if you take it, you must take it as I have it." That complainant relied on these representations, and made no examination into the title. That he now finds they were false and untrue, and that Percy had no title, or if any, only to half, and *that* subject to dower of Ellis's wife, and that the other half belongs to La Roche and wife. That Percy's title to them was acquired from N. A. Ware, who conveyed by power of attorney. That the representations of Percy were false in these particulars:

1. The heirs of Ellis were only authorized to enter 640 acres. They actually entered 812 acres.

2. They were only authorized to enter land surveyed previous to the passage of the act; but they entered the 4th section, which was not surveyed until after its passage.

3. They could only enter such lands as were subject to private entry; instead of which they entered the 4th section, which was not subject to private entry, not having been then offered for sale. The complainant files the certificate of the register at Washington, in Adams county, to prove that the heirs of Ellis were only to enter 640 acres.

The amended bill denies that the heirs of Ellis executed such relinquishment as the act of congress required; that in consequence thereof the patent is void, and passed no title to the 4th section to them. That the representations of Percy as to his title are false and untrue, and fraudulent in law, and misled and deceived complainant. That the title to said 4th section is now in said R. J. Walker, and that Percy, at the time of said representations, knew all the facts. That there was never any consideration, and if any, it has wholly failed. And that if complainant had known the facts, or if Percy had truly disclosed them, he would not have purchased the land.

The answer of the same defendants to the amended bill, states: That they have little or no personal knowledge of the affairs of said Percy, and especially of this contract, which was completed at a distance of four hundred miles from their residence, and therefore, in their former and present answers, they relied and do rely upon information. The facts in the original answer being chiefly derived from N. A. Ware, to whom they supposed the facts were familiar. They admit the genuineness of the letter of Percy, but they deny that it sustains the allegations of complainant, and aver that it shows his *opinion* only of his title and his refusal to warrant. They admit that he said he claimed under the heirs of Ellis, to whom a patent had issued under the act of the 29th of May, 1830, after the performance, on their part, of every stipulation required in the act; and this representation, if material, they believe was true in fact and in law. They state, that in the year 1831, N. A. Ware, as agent for the heirs of Ellis, and who had intermarried with their mother,

Vick v. Percy et al.

opened a correspondence on the subject of this grant with the commissioner of the general land-office, requesting his instructions to the register of the land office, at Mount Salus, Mississippi, and that the commissioner addressed him a letter dated 27th August, 1831, in which, after referring to the act of congress, he says, "the decision of this office is, that the section to be located must be situated in a township surveyed at the time of the passage of the act," and after stating that they had in view the location of a particular section, "requests the register to respect the location made by their agent." In answer, the register says, "the heirs of Ellis have made choice of section 4, T. 8, R. 8 west." The defendants file an original letter from Samuel Gwin to Ware, in which he says, on looking on the map, "I see this section is marked in pencil, 'Reserved for the heirs of Ellis,' and adds, "all I have to do, is to reserve the section from sale." That La Roche and wife and T. M. Ellis, in writing, accepted the location.

That on the 25th day of January, 1832, Mr. Samuel Gwin, register, wrote to the commissioner of the general land-office as follows: "It appears, by the letters on file, that Mr. William B. Cook has selected the 4th section of 21 Town. of R. 8, west, for the heirs of Ellis, and that the former register has marked it as reserved for the heirs of Ellis, on the map. It only remains for me to say, that this township was surveyed previous to the passage of the above act, and that upon its selection it was reserved from sale, and is still withheld." And that nothing further in his (Gwin's) opinion was then required but the relinquishment of the heirs of Ellis.

Respondents aver that previous to the issuance of the patent, such relinquishment as the commissioner of the general land-office required, was executed and filed with him by the heirs of Ellis, in pursuance of said act of congress, and that thereupon on the 9th day of May, in the year 1833, a patent, in due form of law, reciting a full compliance on the part of the heirs of Ellis with the act of congress of 29th of May, 1830, was duly issued to said heirs by name, for said 4th section of T. 21, R. 8, west. The original patent is filed.

That according to the act of congress the heirs of Ellis were permitted to enter, without the payment of any consideration therefor, one section of the public land according to the surveys (then) hitherto made in the state of Mississippi, and that the entry of said 4th section was in strict conformity to the grant, which specifies no number of acres, and only restricts the entry to one section of the public land, according to the surveys previously made.

They deny that said 4th section was surveyed after the passage of the act.

They admit that the heirs of Ellis were Thomas G. Ellis and Mary La Roche, formerly Mary Ellis, and that Percy held said lands under a deed executed by N. A. Ware, as their agent, by virtue of a power of attorney, and from Thomas G. Ellis, and that complainant's exhibit is a true copy thereof; and that when the same was made La Roche and wife were citizens and residents of Pennsylvania; but they say that when said deed was executed, said Ware had also a general and comprehensive power of attorney from them, authorizing him to sell any real estate they owned in the state of Mississippi; and they file a copy.

They state that Percy was the brother-in-law of said Ware, and uncle to the heirs of Ellis, who were the children of his sister, and that unlimited confidence and trust existed between the parties. That Percy was not acquainted with the forms of the laws of the state of Mississippi, respecting the authentication of deeds, &c., and that previous to the execution of the deed of March, 1834, Ware assured him his power to convey was regular and ample, as, under it, he had sold other lands of La Roche and wife to very particular men and competent judges, governor Poindexter among them, without objection. Percy, relying on these statements, ratified the contract, with a full belief that he thereby acquired a full and complete title, and they believed that during his lifetime nothing was ever suggested to induce him to distrust its validity, so far as the heirs of Ellis were concerned. Had such been the case he could, at any time within sixty days, have remedied all imperfections, and would have done so had he suspected the existence of any. They aver that they

never heard the regularity, completeness and validity of the title from the heirs of Ellis to said 4th section, questioned, in the remotest degree, from any quarter, until the application to file the supplemental bill of complaint; since which time, to vindicate the good faith of said Percy and his vendors, and without taking it upon themselves to pass upon the sufficiency of said conveyances, they have obtained from said Rene La Roche and wife a conveyance in fee simple for said 4th section, to complainant, duly acknowledged and certified, which they file and tender to complainant, and avow their readiness to cause to be made to him such other and further assurance of title as the court may direct.

They admit the death of Ellis, and the marriage of his widow with Charles G. Dahlgren. They do not know whether said Percy was informed that she had a dower interest in said land, and, never having heard him say anything on the subject, suppose his attention had never been directed to it. They have obtained and file a deed from said Dahlgren and Mary M. his wife to said complainant for the dower interest of said Mary M. in and to said 4th section, duly acknowledged and certified.

They say that Percy made no untrue, or false, or fraudulent representation, nor did he mislead or deceive the complainant in any manner, nor represent said title to be otherwise than in good faith and honesty he believed it to be.

They say that on the 12th day of November, 1833, more than six months after the emanation of the patent to the heirs of Ellis, the register and receiver of the land-office at Chocchuma offered said 4th section at public sale, and reported the same to the commissioner of the general land-office. That officer, in reply, recites the entry by the heirs of Ellis and the issuance of the patent to them, and says he has received a protest against their right from Mr. Walker; and after stating the facts, informs them they did wrong in making the sale, and says the purchaser can get his money back, &c. That since their former answer, they have found, among the papers of said Percy, three letters from complainant to him, which they file as exhibits, and from which the following are extracts:

Vick v. Percy et al.

Extract from the first letter, dated March 15, 1837.

"I wrote to you some time since relative to the 4th section of land near my plantation on Lake Bolivar, and directed it to Princeton; but receiving no answer I suppose you were not there.

"The object of my letter was to ascertain whether you were disposed to sell it; and to learn the situation of the title," &c.

Extract from the second letter, dated May 12, 1837.

"Your favor of the 20th of April came safely to hand, and would have been answered ere this, but I wished to obtain some information relative to the course Messrs. Walker and Bernard intended to pursue. I saw Mr. Bernard, who appears very *confident* that his claim will prove successful. I do not think it will, but I had no idea of purchasing your claim without a warranty, particularly when I offered you the full worth of the land with a perfect title, and I was very much surprised when I received your last, to find that you intended only to convey to me your quit-claim.

"I would have, even with a warrantee title, to run some risk in buying it, because I never would, in case I lost it, be fully compensated for clearing the land."

Extract from the third letter, dated July 16, 1837.

"I want this land, and am disposed to give you more than I think it worth to any one else. I will give you my land near Worthington's, and \$ 18,000, payable in three annual instalments; the first payable twelve months after the first day of January next; with a distinct understanding that Walker and Bernard's title shall not prevent the payments. This is the best I can possibly do; all my friends think it entirely too high, and that I am very foolish to make the offer, but I want the land and am willing to give a high price. If you are disposed to take this, you will please write me; and upon your acceptance you may consider it a trade; and your refusal will put an end to our treaty. Walker and Bernard have obtained a patent for it, and are very sanguine of success; but I think you will get it; enough on this subject."

That Percy, in his lifetime, instituted suits on the notes, in the

circuit court of the United States, at Jackson, and recovered judgment, and they file a certified transcript of the record thereof, and plead and rely upon it, as conclusive.

The chancellor on this state of the pleadings, no proof being taken by either party, dissolved the injunction; and the complainant appealed.

J. S. and G. S. Yerger, for appellant.

1. A misrepresentation of the vendor in relation to the title of land, by which the purchaser is deceived, is fraudulent, whether the vendor knew it to be false or not. *Smith v. Richard*, 13 Peters's R. 26; *Boyer's Ex'r. v. Grundy*, 3 Peters's R. 210; *Donelson v. Heakly*, 3 Yerger's R. 178; *Parham v. Randolph*, 4 Howard's R. 435; *McMurren v. Sona*, 4 Howard's R. 160.

2. If there be fraud in the sale, it dispenses with the necessity of an eviction. *Parham v. Randolph*, 4 Howard's R. 435.

The representation made by Percy as to the title to the lands sold to Vick, and whilst he and Vick were in treaty therefor, was untrue in two particulars. 1. In the representation "that Ellis's heirs had, before the issuance of the patent to them, complied with every stipulation required of them by the act of congress," under which they claim.

2. In the representation "that he, Percy, had a good and complete title to the land," even admitting the title to have once been in Ellis's heirs. 12 Wheaton's R. 586; 2 Laws relating to Public Lands, No. 876, p. 870; 19 Louisiana R. 334, 340; 4 Laws U. S. 456; 8 Ib. U. S. 365; How & Hutch. Rev. 346, sect. 13, 15; 4 Bibb's R. 516, 521, 526; 1 Marsh. 357; 5 Litt. 317; 5 Binny, 296; 15 Serg. & R. 71; 14 Ib. 84; 7 Ib. 43; 1 Peters's R. 109, 328; 12 Ib. 345; 5 Mass. R. 67; 1 Hill's N. Y. R. 121; 2 Ib. 240; 17 Wend. 119; 2 Lomax Dig. 18, 350, 354; 2 Dev. N. C. R. 306; 3 Ib. 317; 4 Ib. 514; 2 Hay. 410; 1 Dev. & Batt. 34, 328, 582; 4 Ib. 51; 1 Dev. Eq. R. 500; 1 Dev. & Batt. Eq. R. 359; 3 Harris & McH. R. 430; 2 Ib. 19, 38; 1 Ib. 322; 2 Laws relating to Public Lands, No. 30, p. 39; 2 Cranch's R. 87; 13:

Peter's R. 498; 5 Wheat. R. 293; 3 Peters's Cond. R. 286; 4 Ib. 650; 13 Peters's R. 84, 85; 12 Ib. 476; 19 Louisiana R. 334, 339, 510; 2 Howard's S. Court Rep. 284.

3. Percy had not a good and complete "title" to the land when he sold to the complainant, and has not yet acquired it; nor can he now acquire it from the heirs of Ellis, under whom he claims, so as to defeat Vick's equity. How. & Hutch. Rev. 347, sec. 19; 2 Kent's Com. (4th ed.) 154; *Sumner v. Conant*, 10 Vermont R. 1; *Laves v. McKean*, 3 Shepley's Maine R. 304; 5 Day's R. 492; 7 Mass. R. 14; 1 Munroe's R. 48; 2 Bibb's R. 424.

4. The contract having been procured by fraud, a court of equity will not permit Percy or his representatives to procure the title and defeat Vick's right to a rescission of the contract. *Davidson v. Moss*, 5 How. R. 673.

5. It is insisted, however, that Robert J. Walker having purchased from the United States, after the entry of Ellis's heirs, is estopped to set up his title; that the United States were estopped by the patent to Ellis's heirs.

This position is not sustainable. Estoppel does not apply to the government, and if it did it could only grow out of a valid act, and could not arise out of an act absolutely void. 4 Hawk. R. 116; 3 Litt. R. 482; 5 Mason's R. 425; 3 Dev. & Bat. 407.

6. It is further insisted that the judgment in the circuit court of the United States for the southern district of Mississippi is a bar to the relief sought in this proceeding. It cannot be so, because, first, the record in that case shows that the court refused to hear the complainant's defence; second, the trial was after the commencement of this suit in this court, and after jurisdiction had attached; third, the judgment was only on a part of the demands growing out of this transaction; fourth, this suit is for a rescission of the whole contract, and cancellation of all the notes and deeds, and cannot be affected by that suit.

C. R. Clifton, for appellees.

1. It is a well-settled rule, even if the title were defective, that the appellant would have no right to be relieved against

the payment of the purchase-money, merely on that ground, so long as his possession remains undisturbed. *Miller v. Long*, 3 Marsh. 335; *Ib.* 288; 3 J. J. Marsh. 583, 701; 1 Johns. Ch. R. 217, 218; 2 *Ib.* 519; 5 Serg. & Rawl. 204; 13 *Ib.* 386; 5 Litt. 229; 2 Wheat. 13; 5 How. 279, 387.

Cases in which fraud has been practised form an exception to this rule, and fraud is charged here; it is to be inferred, for that reason only, since an examination of the facts demonstrates that it does not exist. The proof shows that Vick made a proposition to Percy for the land, to which Percy acceded, with one exception — *he would not warrant the title*. After saying this, he discloses frankly what he supposes the title to be. For the truth of these facts he cannot be held responsible, because a refusal to warrant the title is a refusal to warrant the truth of the facts of which it is supposed to consist; and though he argues the title afterwards, he says it is unnecessary to do so, for he will not warrant it. If Vick takes it, he must take it as he, Percy, has it. After closing the negotiation, Vick renews his proposition, and says he will take the land with "a distinct understanding that Walker and Bernard's title shall not prevent the payments."

2. The bill seeks a rescission of the contract. The rule in such cases is, to inquire at the hearing, whether the seller *can* make a good title, and not whether he did or could make such title at the date of the contract; and no case can be found where a rescission has been decreed in favor of a purchaser, who had held undisturbed possession of the land from the date of the contract, if his vendor could then make a perfect title. *Langford v. Pitts*, 2 P. Wms. 629; *Wynn v. Morgan*, 7 Ves. 202; 5 Cranch, 562; 1 Wheat. 179; Newl. 238, 239.

The title in this case being now complete, and there being no eviction, no fraud, no injury, the appellant is entitled to no relief.

3. In answer to the positions assumed by appellant, Mr. Clifton argued at length, and cited the following authorities: *Wilcox v. Jackson*, 13 Pet. 498; *Newsom v. Prior*, 7 Wheat. 7; *Fulton v. McAfee*, 7 How. 762; *Miller v. Long*, 3 Marsh. 335;

Vick v. Percy et al.

Ib. 288; 3 J. J. Marsh. 583, 701; 1 Johns. Ch. R. 217, 218; 2 Ib. 519; 5 Serg. & Rawle, 204; 13 Ib. 386; 5 Litt. 229; 2 Wheat. 13; 5 How. 279; Ib. 387; 3 Pet. 210; *Parham v. Randolph*, 4 How. 435; *Moss v. Davidson*, 1 S. & M. 128.

Mr. Justice CLAYTON delivered the opinion of the court.

This was a bill filed by the appellant in the superior court of chancery, to enjoin the sale of certain property under a deed of trust executed to secure the payment of a debt created by the purchase of a tract of land, and to rescind the contract of purchase on the ground of defect of title of the vendor. The land had been conveyed by deed with general warranty of title, and there had been no eviction. The bill charges fraud in the concealment of the defects in the title, and also alleges the insolvency of the vendor's estate.

The answer denies the charge of fraud and concealment, and makes exhibit of a correspondence between the complainant and the vendor, in which the alleged defects are adverted to and canvassed. This was previous to the purchase. The correspondence bears marks of candor and fair dealing upon its face, the objections to the title are made the subject of discussion, and the opinion confidently expressed that the title is good. The charge of insolvency is also denied, and the fact asserted that the estate of the vendor is worth \$50,000, after payment of all its liabilities. No proof was taken, and the complainant has not been evicted, or disturbed in his possession.

The principle is fully established, that in cases free from fraud, a purchaser of land who is in possession, cannot have relief in chancery against his contract to pay, on the mere ground of a defect of title, without a previous eviction. *Anderson v. Lincoln*, 5 How. 284; *Abbott v. Allen*, 2 Johns. Ch. 519.

The only two grounds alleged for the interposition of equity, are fraud and insolvency of the defendant. These are denied by the answer, and there is no proof to establish either. The complainant being in possession under a deed with warranty, with no fraud made manifest, and with nothing to show that

the covenantor is not able to pay any damages that may be recovered against him, has no right to call his vendor into a court of equity to litigate an adverse legal title. He must rely on his covenants, if he should be evicted.

The order dissolving the injunction is correct, and the same is hereby affirmed.

GEORGE A. THOMPSON, PHEBE PITTS, and ISAAC THOMPSON vs.
JORDAN WILLIAMS.

To entitle a party to a new trial, on the ground of surprise, he must show merits, and the surprise must be of such a character as care and prudence could not provide against; the slightest negligence will defeat the application for a new trial, or occasion the imposition of the most rigorous terms.

Where a suit was instituted against several defendants, in May, 1841, and a trial had, and judgment rendered against them all, in November, 1843, and there was nothing in the record, showing that the verdict and judgment were incorrect; and one of the defendants filed an affidavit as the foundation of a motion for a new trial, stating that, on the day before the trial, it was agreed between the plaintiff and himself, that the case should not be tried until they could make an effort to compromise it, and he, relying upon that agreement, went home, and returned the next day and found the case in the progress of trial before the jury; and that the disposition manifested to compromise the suit, and the agreement to let the case stand, "prevented him from asking leave of the court to put in a defence which had arisen since the commencement of the suit, namely, his discharge under the bankrupt law; and the motion for a new trial was overruled: *Held*, that the defence offered by the defendant went merely to his personal discharge, and not to the merits of the action; and that he had moreover been guilty of negligence in not making application to put in his defence at the first term of the court after his discharge occurred, for which no excuse was offered, and the court did right in overruling the motion for a new trial.

The issue on a plea of *nul tiel record* is to the court, and where the judgment, or order to which it was interposed, was read to the jury upon the trial, without exception, the inference is plain, either that the plea was disposed of or waived by the party.

ERROR, from the circuit court of Yalabusha county; Hon. Benjamin F. Caruthers, judge.

This was an action of debt, brought by Jordan Williams against George A. Thompson, Phebe Pitts, and Isaac Thompson, to the May term, 1841, of the circuit court of Yalabusha county. The declaration was founded on an injunction-bond,

and in the usual form. At the return term the defendant, Phebe Pitts, pleaded, under oath, two separate pleas. 1st. That she signed the bond sued on in blank, and it was afterwards filled up without her knowledge or consent. 2d. That she signed her name to the paper when it was blank, and handed it to George A. Thompson, to be filled up as a forthcoming bond, and it was filled up as an injunction bond, without her knowledge or consent. On both of which pleas issue was joined. At the May term, 1842, the defendants filed two joint pleas. 1st. That the injunction had not been dissolved; and 2d. A plea of *nul tiel record*. Issue was also joined on these two pleas. After two continuances were granted, on the application of the defendants, the case was tried at the November term, 1843, when the jury returned a verdict in favor of the plaintiff, for twenty-three hundred and twenty-eight dollars and seventeen cents, and the court rendered judgment accordingly. The defendants made a motion for a new trial. 1st. Because they were taken by surprise. 2d. Because the verdict was against the evidence. And 3d. Because the damages were excessive. The court overruled the motion, and the defendants excepted. The bill of exceptions shows the following facts, to wit: Upon the trial the plaintiff proved the hand-writing of the several obligors to the bond sued on, and that the bond was not blank when it was signed, and then read the bond sued on. Plaintiff also read to the jury a transcript of the record of the proceedings of the superior court of chancery, in the case, in which said injunction bond was executed, and the order and decree of the chancery court, dissolving the injunction granted therein. The defendants then offered to read the execution, with the indorsements thereon, which had been stayed by the injunction, for the purpose of proving a satisfaction of the execution, to the extent of the value of the property which had been levied on; which, being objected to by the plaintiff, was ruled out by the court, and the defendants excepted. Which being all the evidence introduced the jury found for the plaintiff, as above stated. The bill of exceptions further shows that, in support of the motion for a new trial, the defendants read an affidavit of George

A. Thompson, filed on the 25th day of November, 1843, which states that on the day before the trial the plaintiff proposed to him to compromise the suit, to which he assented, and told the plaintiff, as soon as he got through with another case he was then endeavoring to compromise, he would attend to the matter; that it was then agreed between the plaintiff and himself, that the case should not be tried until they could make an effort to compromise it; that, relying upon that agreement, he went home, and was greatly surprised when he returned to the court-house the next morning, and found the trial progressing before the jury; that he immediately called on the plaintiff, and the plaintiff said he was still willing to compromise; that the case had been called and the trial brought on by his, plaintiff's counsel, before he arrived in town that morning. The affidavit further stated, that the disposition manifested to compromise the suit, and the agreement to let the case stand, prevented affiant from asking leave of the court to put in a defence which had arisen since the commencement of the suit, namely, his discharge under the bankrupt law.

The defendant brought the case to this court, by writ of error.

Acce, for plaintiffs in error.

The record in this cause exhibits the following errors:

1. The jury found only *one* issue in favor of the plaintiff below, when *three* were presented for their consideration and decision.

2. No disposition was made of the plea of *nul tiel record*, which presented a question for the adjudication of the court.

3. The court erred in refusing to grant a new trial.

- 1st. Because the affidavit filed in support of the motion for a new trial, shows that the plaintiff below used fraudulent means to obtain the judgment, which is a sufficient cause of itself to secure the interposition of this court.

- 2d. Because the defence upon which one of the defendants (George A. Thompson) intended to rely, to wit, his discharge in bankruptcy, was meritorious in its character, and, if sus-

tained by evidence, would have released him altogether from the judgment rendered in this cause. Now the defendant in question can be released from the judgment, neither in a court of law or a court of equity. *Ex parte Goodwin*, 2 Vern. 696.

Sheppard, for defendant in error.

The court below did not err in disallowing the motion for new trial.

Three causes were assigned for the motion. 1st. Surprise. 2d. That the verdict was against the evidence. 3d. Excessive damages.

The affidavit of Thompson, which seems to have been relied on, will not sustain the first cause. It states, that on the day before the trial it was agreed between himself and the plaintiff that the case should stand open until an effort was made to compromise it; and that thereby he was induced to delay making application to the court for leave to file a plea of bankruptcy, which had arisen since the commencement of the suit. The action had been commenced to the May term, 1841, and from term to term had been continued until November, 1843. And the affidavit should have shown some cause for the delay and neglect to file such plea until the day just before the trial. The court cannot disturb the verdict, if the injustice of the judgment is the result of the inattention of the party. *Green v. Robinson*, 3 How. R. 105.

2. The affidavit should have shown that, if the application had been made for leave to file the plea on the day before the trial, that there would have been good cause for the court to have allowed it; and, for aught that appears, the plea might have been filed at the first term.

3. It does not state that he had obtained his discharge, nor is the certificate of his discharge shown.

The second and third causes are equally untenable. All of the pleas are special, in avoidance, and the burden of proof rested on the defendants. The only witnesses examined were called by the plaintiff, and their evidence fully contradicts the pleas.

The court did not err in refusing to allow the defendants to read the return on the *fi. fa.* as proof of payment, no plea of payment or performance having been filed.

A. C. Baine, on the same side.

Waul, for plaintiffs in error.

The court erred in not granting a new trial.

1. Because the defendants were taken by surprise on the trial.
2. Because the verdict is contrary to law and evidence.
3. Because the verdict was excessive.
4. Because the plea of *nul tiel record* was not disposed of by the court.

By the levy of the execution upon the negroes Jim, Joe, Anthony, and Nance, the judgment was satisfied to their value.

A levy on personal property being a satisfaction, as by the levy the property was changed. *Ward v. Wass*, 7 Leigh, 143; 5 How. 237, 483, 629.

For although the sale was enjoined, yet the sheriff retained the property, and was not required to deliver it to defendant below, until the act of 1842.

And after the dissolution of the injunction, it was the duty of the plaintiff below to have a *venditioni exponas* issued, to sell the property remaining in the hands of the sheriff.

The conduct of the defendant, George A. Thompson, as shown by his affidavit for a new trial, evinces surprise, through the deceit practised on him by Williams, and prevented his making a full, legal, and adequate defence, his certificate of discharge, which would have released him from the debt.

The plea of *nul tiel record* was not decided by the court, and the jury had no more authority to try it by inspection, than they would have to decide the causes of demurrer. Indeed, there is no judgment whatever on the plea of *nul tiel record*.

Mr. Justice CLAYTON delivered the opinion of the court.

This was an action in the circuit court of Yalabusha county,

upon an injunction bond. Several pleas were interposed, all of which were found against the defendants, the now plaintiffs in error. Giving to the verdict its proper weight, we see nothing in the record to show that the finding of the jury was incorrect.

George A. Thompson filed an affidavit, as the foundation of an application for a new trial. This states, that on the day before the trial was had, it was agreed between affiant and the plaintiff, that the case should not be tried until they could make an effort to compromise it. It farther states that he, affiant, went home, relying on this agreement, and when he returned the next day he found the case in the progress of trial, before the jury. It also states, "that the disposition manifested to compromise the suit, and the agreement to let the case stand, prevented the affiant from asking leave of the court to put in a defence which had arisen since the commencement of the suit, namely, his discharge under the bankrupt law."

This affidavit was filed 25th November, 1843; the cause had been pending in court, since April, 1841, and had been continued on several occasions. The bankrupt law was repealed in March, 1843, so that the alleged discharge of the defendant must have occurred more than one term of the court before this application. This delay is not accounted for. There is no act on the part of the plaintiff which prevented the filing of the plea. The application ought to have been made at the first court after the discharge took place, and the defence put in as a plea since the last continuance.

The court is now asked to grant a new trial, not to let in evidence applicable to the present state of the pleadings, but to permit the party to make a new case, and to go to trial upon that. The rule is, that "to entitle the party to relief there must be merits, and the surprise must be such as care and prudence could not provide against. The slightest negligence will defeat the application, or occasion the imposition of rigorous terms." *Graham on New Trials*, 174. The party here is not, by the terms of this rule, entitled to relief. He has been guilty of negligence, and offers no excuse for it. The defence which he offers goes merely to his personal discharge, and not to the

merits of the action. The judgment is against two other defendants; the discharge of the affiant does not make them the less liable; and yet we are asked to set aside the judgment as to them, in order that this defendant may have an opportunity to set up his personal discharge. The circuit court did not err in refusing the application.

It is objected, that the plea of *nul tiel record* was not disposed of. That was an issue to the court. The judgment or order to which it was interposed, was read to the jury upon the trial, without exception; the inference is plain, either that the plea was disposed of, or waived by the party.

The other objections need not be minutely answered.

The judgment is affirmed.

WILLIAM H. MOUNT vs. THE STATE.

On the trial of the defendant, for suffering a gaming-table to be exhibited in the house occupied by him, the court refused to instruct the jury "that if the accused had let the rooms of his house in which the exhibition of the 'faro-bank took place, to certain persons, and that at the time when he let them, he had no knowledge or expectation that they would be used for that purpose, they must find for the defendant; *held* that the instruction was properly refused; and that the tenants of the accused were equally subject to the statute.

In error from the circuit court of Hinds county; Hon. John H. Rollins, judge.

An indictment having been found against William H. Mount, for suffering faro to be exhibited in his house, a trial was had in July, 1844, when the following facts were proved:

Robert Brown testified that he saw faro dealing in three rooms of the Eagle Hotel, in Jackson, kept by the defendant, during the previous winter while the legislature was in session; that he saw the dealing both day and night, but did not see the defendant in either of the rooms, or about when the dealing took place.

Charles W. Hart testified that he saw the faro dealt in that hotel, both up stairs and down stairs, at the period spoken of by the other witness; no guard was kept about the rooms, which seemed to be accessible to any one who might claim to go in; that he did not see the defendant in either of the rooms, but once, while witness was in one of them while the dealing was going on, a negro, belonging to the establishment, was in the room and was called out by the defendant, who came near the door, but did not go in.

Other testimony to the same effect was offered; but by none of the witnesses was it proved that Mount was in the room, or knew of the dealing.

The defendant proved that he had leased the rooms to the occupants, in which the exhibition took place, for a month for \$150 per month, during which time the dealing took place.

The defendant asked the court to instruct the jury, "That before they could find the defendant guilty it must have been proved to them that he knew of the unlawful gaming in his hotel"; this instruction was given by the court with the addition, "That the jury were authorized to infer such knowledge from circumstances which would authorize the inference."

The defendant then asked the court to instruct the jury, "That if they believed, from the evidence, that the defendant rented the rooms in which the exhibition took place, and during the tenancy the exhibition occurred; and that he rented the rooms in good faith, without any knowledge or expectation that they would be used for the exhibition of faro-banks, he was not responsible for their exhibition during the continuance of the tenancy." The court refused to grant this instruction, and the defendant excepted.

The jury found him guilty; and the court fined him \$250 and ordered him to be committed until it and the costs were paid, from which judgment he prosecutes this writ of error.

Howard and Foote, for plaintiff in error.

John D. Freeman, attorney-general, contra.

Mr. Justice THACHER delivered the opinion of the court.

This was an indictment against the plaintiff in error, for knowingly suffering a gaming-table, called a faro-bank, to be exhibited in the house occupied by him.

The court below declined to instruct the jury to the effect, that if the accused had let the rooms of his house, in which the exhibition of the faro-bank is proved to have taken place, to certain persons, and that at the time when he let them he had no knowledge or expectation that they would be used for the purpose of such an exhibition, the jury must find for the defendant.

This charge, we think, was properly refused, for if the accused,

after he had let the rooms in good faith, and without any knowledge of the unlawful purposes for which they would be used, knowingly permitted them to be occupied and improved for such an exhibition, he would still be answerable under the statute. The tenants of the accused would be equally subject to the statute. *Regina v. Pierson*, 2 Ld. Raym. 1197.

In the other respects of this case, the evidence seems to warrant the finding of the jury, and upon close examination, the remaining assignments of error are not found to embrace anything that would warrant a reversal of the judgment.

Judgment affirmed.

CHARLES G. DAHLGREN, Administrator de bonis non of Joseph Neibert, deceased, vs. STEPHEN DUNCAN, et al.

Under the statute of this state, which provides that when a person dies insolvent, his estate, "both real and personal, shall be distributed to and among all the creditors, in proportion to the sums to them respectively due and owing;" taken in connection with the statute that makes "all promises, contracts and liabilities of copartners joint and several," the debts due by a deceased person individually and as a partner, will stand on exactly the same footing and be entitled to equal satisfaction out of the insolvent's estate. Mr. C. J. SHARKEY dissenting.

In such case, if the creditor of the partnership have sued the surviving partners, and procured payment of any portion of the debt, the estate of the deceased will be entitled to the benefit of it; if the creditor looks only to the estate of the deceased, and that pays more than its proportion, the representatives of the estate will stand in the place of the creditor and substituted to his rights with reference to the other partners.

After the report of the commissioners of insolvency has been received and allowed, the probate court cannot at a subsequent term open it for any cause, unless the former orders were null and void.

The case of *Robins v. Norcum*, 4 S. & M. 332, declaring the want of jurisdiction of the probate court of a petition by a creditor of an estate, after the report of the commissioner of insolvency is allowed, to settle conflicting rights between creditors, cited and confirmed.

ON appeal from the probate court of Adams county; Hon. Thomas Fletcher, judge.

Charles G. Dahlgren, as administrator de bonis non of Joseph Neibert, deceased, represented his intestate's estate to be insolvent to the probate court of Adams county, in which his letter of administration had been granted.

Commissioners were duly appointed to audit and allow claims against the estate of the deceased, which claims, as allowed and reported to the court, amounted, in the whole, to the sum of \$876,094⁰⁰/₁₀₀, of which \$449,070 were the individual or separate

Dahlgren v. Duncan et al.

liabilities of Neibert, 247,085 $\frac{37}{100}$ his liabilities as a copartner in his lifetime of the firm of Neibert & Gemmell; and \$196,959 $\frac{23}{100}$ as a copartner of the copartnership of Neibert, Gemmell & Co.

The report of the commissioners was confirmed by the probate court for the whole amount, without objection.

Stephen Duncan, at a subsequent term of the court, filed his petition for a dividend of the moneys in the hands of the administrator, among the separate creditors, to the exclusion of the creditors whose claims arose through the partnership.

The answer of the administrator sets forth the amount of money in his hands, and the facts as to the claims allowed, the report of the commissioners and its confirmation, and prays that other creditors might be made parties to the proceedings, so as to contest their respective claims to the fund; and submitted the whole matter to the decision of the court.

An amended and supplemental petition was filed by Duncan, making a number of the creditors parties, &c. It is not deemed necessary to notice the pleadings at greater length.

Answers were put in by a number of the creditors, separate and copartnership, the latter claiming a *pro rata* dividend on their claims allowed by the commissioners and confirmed by the court, in the same manner as the claims of the separate creditors.

H. S. Eustis, one of the parties, demurred to the petition, and raised the question of the jurisdiction of the court.

The administrator, Dahlgren, demurs to the amended petition, also to have the question of jurisdiction determined.

These demurrers were overruled by the court.

There is an agreed statement of facts signed by counsel, forming a part of the record, which shows (besides what has been recited) the names of the copartners of Neibert & Gemmell, and Neibert, Gemmell & Co.; that the partners survived Neibert, but are now dead, and their estates insolvent, and that no dividend had ever been declared on their estates; also the rates of depreciation of the notes of the banks, who are creditors of Neibert.

It is not deemed requisite to set it out more fully.

The probate court rendered its decree, and adjudged that the separate creditors were entitled to the separate estate of Neibert in the first instance, and that the copartnership creditors should be postponed till the separate creditors should be paid in full, if there should be a fund sufficient. The court accordingly declared a dividend of four per cent. in favor of the separate creditors.

An agreement by counsel is in the record, that either party to the record could avail himself in this court of any errors committed by the court of probate in the case, on this appeal, which has been prosecuted by Dahlgren, administrator, that the questions involved in the case might be settled.

Eustis, for appellant, and the creditors of the partnership.

The question of jurisdiction, raised in this record, has been lately settled in the case of the *Commercial and Railroad Bank of Vicksburg v. Mercein and Bennett*, which shows that after the report of the commissioners of insolvency is confirmed, the probate court has no jurisdiction over a petition by creditors which seeks to settle conflicting rights between creditors. As counsel for the partnership creditors, we wish the merits of the decree of the judge of probate could be examined. He has followed (except upon the question of jurisdiction) the opinion of the chancellor in *Pinckard & Arnold v. Hamer*, Freem. R. 517.

We think this opinion will not bear examination. First, we admit, that partnership creditors have a prior right in equity over private creditors, against partnership effects. The reason of this is, that by the partnership the partnership property is, as between the partners, specifically pledged for the payment of the partnership debts. But is the converse true? Can it be said that in equity there is between the partners a specific pledge of the private property of each, for his private debts? Does not a party, contracting with a partnership, look as well to the private wealth of the partners as to the extent of the partnership investment? Does not the statute say, that the joint contract is joint and several? We admit, farther, that the rule is fixed in the English bankrupt courts; the private estate goes to the pri-

vate creditors, the partnership estate to the partnership creditors. But English judges admit that the rule was adopted arbitrarily, and some of them deny its foundation in equity. What does Chancellor Buckner, in the case cited, give as his reason for the rule? He says: "Upon the death of one partner, the claim of joint creditors survives against the surviving partner, and is *extinguished at law* against the estate of the deceased partner, to which they can only resort through the aid of a court of equity, where the advantage thus thrown *by accident* upon the separate creditors, will be preserved. The separate creditors having acquired *priority at law*, and having equal equity, that priority must be preserved." Freem. R. 516.

But for this accident of priority at law, the chancellor admits that the equities of the different classes of creditors would be equal. Now the fact is, no such accident exists; there is no such priority at law. The chancellor, and the counsel who argued that case, as appears from the briefs, all overlooked a statute, which was apparently made for the precise state of fact, which prevents the claim of the joint creditor being *extinguished at law* against the estate of the deceased partner. We refer to How. & Hutch. 578, sec. 8.

In case of the death of one or more joint obligor or obligors, the joint debt or contract shall and may survive against the heirs, executors, and administrators of the deceased obligor or obligors, as well as against the survivor or survivors; and a recent decision of this court, authorizes the reviving against the administrator, and proceeding to judgment against him in the same suit with the co-obligors. Where, then, is the *priority at law* upon which the chancellor based his decision? By an arbitrary rule in England, and in some of the United States, where there is no such statute as the foregoing, a party trusting two persons, may find himself worse off than if he had trusted but one of them. No case that we have seen has satisfied us of the equity of such a result; and all our legislation upon joint contracts exhibits a different view of the question in this state.

Counsel for appellees admitted, on argument, that the commissioners' report could not be opened for the purpose of *sealing*

their claims, but insist that it can for the purpose of securing to them a larger dividend. We take it, the *purpose* will not be the criterion of the power.

Quitman and McMurren, for appellant.

Two questions arise in this case. Whether the probate court had jurisdiction? And if it had, whether it decided correctly in decreeing a dividend to the separate creditors, to the exclusion of the other creditors?

We state the points, and will remark very briefly on them, as we appear for the administrator, who is perfectly indifferent as to the result, but who has prosecuted this appeal under our advice, that he might be enabled to discharge his duties with safety to himself, and to the satisfaction of all interested in the estate of Niebert.

1. As to the question of jurisdiction. Finding a decision of the late chancellor on the subject, we have considered the question worthy of the serious consideration of this court. In the case of *Arnold & Pinckard v. Hamer et al.* Chancellor Buckner has determined, that the marshalling of the assets of an insolvent estate between separate and copartnership creditors, belongs peculiarly to the court of chancery, and that the probate court is inadequate to the adjustment of the conflicting rights among these creditors. He considers that it is only through a court of equity that the separate creditor is entitled to a priority. 1 Freem. R. 509, 516, 518.

2. In the same opinion, just referred to, the chancellor is clearly of opinion, that the separate creditor is to be preferred as to the separate estate; but that if the commissioners of insolvency have reported on the claims, and that report been confirmed in favor of the joint as well as the separate creditors, the probate court cannot look behind the confirmation of the report, and distinguish between the separate and copartnership creditors. The statute is quite peremptory and definite. How. & Hutch. Dig. 409, 410, sec. 80.

We think the weight of authority is in favor of the separate creditor being entitled to the separate fund in the first place,

and the copartnership creditors to the copartnership estate. But there are respectable authorities to the contrary. *Bell's Executor v. Newman*, 5 Serg. & Rawle, 78; 1 Ashm. R. 347, Spring's estate.

The question of jurisdiction in favor of the probate court is, to our minds, greatly increased by the commissioners' having reported on the claims of the copartnership, as well as separate creditors, and that report confirmed. Whether that court can now inquire into, and distinguish the classes of creditors, and declare a dividend in favor of the one class, and exclude the other?

We submit the whole subject to the consideration of the court, only asking, that the questions raised in this case may be fully determined by this court.

Montgomery and Boyd, for appellees.

There are but two points in this case.

1. As to the distribution of the estate of an insolvent's estate among creditors. The creditors are of two classes. Individual and partnership. The whole question, with all the authorities which it is considered important to produce, will be found fully presented in the written opinion of Judge Fletcher, herewith presented.

2. Has the probate court the right to prescribe the funds in which the administrator shall pay any particular creditor, or to reduce the claim of a creditor reported by the commissioner. We consider the first branch of this question as to the power of the court to direct the administrator to pay the creditors in anything but money, fully settled in the case of *Robins et al. v. Norcum et al.* 4 S. & M. 332.

The other question, as to the power of the court to interfere with the report of the commissioners of insolvency, has been so often decided that it has become familiar, and no reference to the cases is necessary.

The following is the opinion of Judge Fletcher, delivered
VOL. VII. 25

Dahlgren v. Duncan et al.

in the court below and referred to in the foregoing argument of Messrs. Montgomery and Boyd, viz. :

This is a petition of Stephen Duncan, a creditor of the estate of Joseph Neibert, praying an order of distribution of the funds now in the hands of Charles G. Dahlgren, administrator *de bonis non* of Joseph Neibert, among his separate creditors, postponing until they are fully paid, the creditors of Niebert & Gemmell, Neibert, Gemmell & Co., of which firms, Joseph Neibert was a partner, and whose claims were regularly proved before commissioners of insolvency, and their report confirmed by this court, at September term, 1842. The estate of Neibert being declared insolvent, the report of commissioners contains a classification of his liabilities, separately, and as a member of said firms. The total amount of claims allowed against the estate of Neibert, as exhibited by the report of the commissioners, was \$876,094 55; of which sum, there was due his individual creditors, \$439,602 83. Peter Gemmell was the surviving partner of the firms of Neibert & Gemmell and Neibert, Gemmell & Co. Upon the death of Gemmell, letters of administration were granted on his estate to Samuel T. McAlister and Ann P. Gemmell, who took possession of all the rights and credits of both partnerships. It appears, from their inventory, that they received from the proceeds of partnership property, the sum of \$10,947.

The report of the commissioners shows the Planters Bank and others of Mississippi, are creditors of Neibert's estate; and that on some claims, allowed by the commissioners, partial payments were made by former administrators of his estate.

The answer of Dahlgren admits that he has funds belonging to the estate of Joseph Neibert, amounting to the sum of \$18,033 67, and that he has not participated in any administration of the effects of either of said partnerships, of which Neibert was a member. It appears, from the answer of James C. Wilkins, that, as surety of Neibert, he has paid a large amount of the claims proved before the commissioners of insolvency, by the Commercial Bank of Manchester and other banks of this state.

The chief question, arising on the petition and answers, is as to the mode of distribution to be adopted by the court. It is one of novelty as regards the action of the probate court, and of much interest to the different classes of creditors whose claims have been proved before the commissioners of insolvency, and their report confirmed by this court. The principle contended for by the petitioner, had its origin in the distribution of the effects of bankrupts, and has been applied in the distribution of the assets of decedents, both in this country and in England. The history of the rule is exceedingly interesting, but it is not essential that it should be detailed. It was established as early as 1715, and maintained for a period of sixty years, until the administration of Lord Thurlow; reestablished with modifications in 1796, and generally adhered to at the present day.

The rule, as fully stated by Chancellor Kent, in his learned Commentaries, (vol. 3, p. 65,) is, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner. If the partnership creditors cannot obtain payment out of the partnership estate, they cannot in equity resort to the private and separate estate, until private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property until all the partnership creditors are satisfied.

Mr. Justice Story, in his elaborate and profound treatise on partnership, (p. 530,) represents the rule to be firmly established, but suggests that it is founded more upon authority, than in the principles of natural justice. He states it to be a general rule, in bankruptcy, that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over the separate debts of the bankrupt; and so in the converse case, the separate debts are primarily payable out of the separate effects, and possess a like preference; and the surplus only, after satisfying such priorities, can be reached by the other class of debts. Notwithstanding his doubts of the justice of the rule, which he considers resting on a foundation as ques-

tionable and unsatisfactory as any rule in the whole system of our jurisprudence, yet he concludes, for the public repose, it should be left undisturbed, as it may not be easy to substitute any other rule, which would uniformly work with perfect equality and equity in the mass of intricate transactions connected with commercial operations. Story on Partnership, 541.

The rule is stated with equal clearness by Gow, in his work on Partnership, (p. 308,) to be, that where there are different sets of creditors, each estate shall be applied exclusively, in the first instance, to the payment of its own creditors, the joint estate to the joint creditors, the separate to the separate; and that neither the joint creditors shall come upon the separate estate, nor the separate upon the joint, but only upon the surplus of each that shall remain after each has fully satisfied its own creditors respectively.

The case of *McCulloh v. Dashiell's Administrator*, (1 Harris & Gill's R. 96,) is a strong case in point, and fully sustains the authorities referred to. Peter Dashiell and Richard Bennett were partners in trade, dealing in merchandise, under the firm of Dashiell & Bennett. A bill of exchange was drawn by Chase and Tilyard on said firm, in favor of McCulloh, and accepted by them. Suit was subsequently brought against the firm, on their acceptance, and, pending the action, Dashiell died intestate. Judgment was recovered against Bennett, the surviving partner, who afterwards obtained the benefit of the act for the relief of insolvent debtors. No part of the judgment had been paid at the time of his discharge. Letters of administration had been granted to Parsons upon the estate of Dashiell, who had a large amount of assets in his hands, (together with an inconsiderable sum of the partnership funds,) yet his personal estate was insufficient to pay his separate and private debts. Upon the application of McCulloh to the Somerset county court, sitting as a court of equity, to be paid an equal proportion of his claim out of the assets in the hands of Parsons, with the separate creditors of Dashiell, it was refused by the county court, and, on appeal, its decision sustained in the court

of appeals of Maryland. In a luminous review of the leading cases in bankruptcy, displaying much research and ability, Mr. Justice Archer, in delivering the opinion of the court, adhered to the rule, for the very forcible reason, that the joint estate is benefited to the extent of every credit which is given to the firm, and so is the separate estate in the same manner enlarged by the debts it may create with any individual, and there would be unquestionably a clear equity in confining the creditors to each estate respectively, which has thus been benefited by their transactions. The court adopted the ancient rule, as consonant with equity and justice, (even when the administrator had funds of the firm in his hands,) that the joint creditors can only look to the surplus after the payment of the separate debts; and, on the other hand, that the separate creditors can only seek indemnity from the surplus of the joint fund after the satisfaction of the joint creditors.

Our own able and energetic chancellor, by a similar train of reasoning, no less cogent, considers the law well settled upon principles of equal justice and solid reason, that on the death of one of several partners, a joint creditor has no claim for the payment of his debt out of the separate estate of the deceased partner, until the claims of the separate creditors have been first satisfied. *Arnold & Pinckard v. Hamer et al.* Freem. Ch. R. 509, and *S. W. Oakey & Co. v. Rabb's Executors*, Ibid. 546.

The main reasons assigned for the rule in equity are, that each estate ought to bear its own debts; that in contracting with the individual member of a copartnership, we rely upon his sufficiency; but in dealing with the firm, the credit is supposed to be given to the partnership. The funds on which the credit was given are to be liable. The joint creditors having increased the joint fund, and those who make advances on the separate credit having created the separate fund, natural justice requires that the funds so constituted shall be applied to the respective demands. In dealing with a firm, we view it as a unit, and as such hold it responsible, without regarding the sufficiency of each member of the partnership. For general reference to American authorities, see 5 Johns. Ch. R. 60; 3

Paige's Ch. R. 169, 517; 6 Ibid. 19; 22 Pick. R. 454; 2 McCord's Ch. R. 302; 1 Nott & McCord's R. 557; 2 Dessausure's R. 270, and 1 Story's Equity, 625.

The rule is just and reasonable—not founded alone upon convenience or authority, but in equity; to be revered for its purity and antiquity, and being thus firmly established by a series of decisions of the ablest jurists of the country, this court, in exercising its equity powers, is bound to conform to them, unless inconsistent with some statutory provision, peculiar to our code of laws.

There is nothing in the eightieth section of our probate laws, (How. & Hutch. 409, 410,) which prescribes the course of proceeding when an estate is insolvent, that is inconsistent with this rule. The proposed mode of distribution is not expressly forbid, or by implication; nor can it be inferred, from any clause in this section, that the legislature intended to change a rule that had been established and maintained more than a century. The spirit of the law harmonizes with the rule, and while the statute accomplishes the purpose for which it was designed, does not conflict with the equitable principle. It has reference to the payment and distribution, in the first place, of a "single fund among its own peculiar creditors." It would be a forced construction of the statute, in distributing the assets of an insolvent estate, to include under the terms "creditor," joint creditors, "debts," joint debts, or "estate," joint estate. Viewing the object, reason, and spirit of that section, it cannot embrace partnerships. It can only embrace, in the first instance, "the debts which the *deceased* owed," and not the liabilities of the different firms of which he was a member. On the dissolution of a partnership by the death of one of the partners, the surviving partner is entitled to the possession of the effects of the partnership, and settles the affairs of the firm. Neither the representative of the deceased partner, nor this court, can exercise any control over such funds. The creditor of the firm, it is true, may, by statutory regulation, pursue such representative, as well as the surviving partner; but when the estate of the decedent is represented to be insolvent, he can only claim a

pro rata dividend out of the surplus of the separate estate of the deceased partner, after paying the amounts "due and owing" the separate creditors. Any other construction of the statute would be abhorrent to equity, and work gross injustice to the separate creditors of Neibert's estate. Chancellor Buckner, in the case of *Arnold & Pinckard v. Hamer et al.* expresses the opinion, that "this statute does not, in any way, interfere with or change the legal rights of separate and partnership creditors." The act of 1836, (How. & Hutch. 595,) making the promises, contracts, and liabilities of copartners, joint and several, and of 1822, (Rev. Code, chap. 13, sec. 25,) providing that in case of the death of one or more obligor or obligors, the joint debt or contract shall and may survive against the heirs, &c. of the deceased obligor or obligors, as well as against the survivor or survivors, &c. have not in any respect altered or modified this rule in equity. They have reference solely to the remedy against parties, and do not affect the rights or priorities of joint and separate creditors.

But it is strongly urged, as the claims of the partnership creditors have been regularly proved before the commissioners of insolvency, and their report confirmed, this court is precluded from further adjudication. It is true, the report of the commissioners contains a classification of the different creditors, but the examination, and order of confirmation of that report is not conclusive as regards the equities or priorities of those creditors. It is only conclusive as to the amount of the claims of the various creditors. The order of confirmation, and a decree of distribution are separate and distinct. This court cannot now open the commission, except upon the ground of fraud, but in ordering a distribution of the assets in the hands of the administrator among the separate creditors of the estate, what interlocutory order or decree of the court will be disturbed? There has been no decree that will be reversed or vacated by the present judgment of the court; and no right impaired that may be conferred upon any creditor by the statute. It was very prudent for the partnership creditors to have proved their claims. Without this precaution, upon the contingency of there being a sur-

plus after the satisfaction of the separate creditors, they could not demand it, as their claims would be barred, — unless they could “find other estate not inventoried or accounted for by the administrator before distribution.”

It is worthy of remark, that in Massachusetts, by an act passed in 1838, for the relief of insolvent debtors, the rule adopted for the distribution of the effects of such debtor, is that the net proceeds of the joint property should be appropriated to pay the joint creditors, and the net proceeds of the separate estate of each partner should be appropriated to pay his separate debts.

The probate court having exclusive jurisdiction over all matters confided to it by the constitution, with powers as ample as a court of chancery, so far as that jurisdiction extends, and being its peculiar and exclusive province to order the distribution of the assets of an insolvent estate, I shall therefore, appoint an auditor to report the amount due the separate creditors of Joseph Neibert, and decree distribution of the funds now in the hands of his administrator, among that class of creditors, postponing the creditors of Neibert & Gemmell, and Neibert, Gemmell & Co. until they are fully satisfied.

According to the above opinion of the court, it was ordered, adjudged, and decreed, that the funds in the hands of said Dahlgren, administrator as aforesaid, being the separate estate of Joseph Neibert, are properly liable in the first place for the payment of the claims of the separate creditors of said Neibert, and that the claims against the partnerships of Neibert & Gemmell and Neibert, Gemmell & Co. be postponed until the separate creditors of said Neibert be fully paid and satisfied. And when payments have been made by former administrators of said Neibert on claims, the administrator shall not pay any dividend on such claims, until the dividend now, or hereafter to be declared, equal the sum paid on such claims; that on all claims due the banks of this state, he shall pay them their dividends in their respective notes, at par; and when notes discounted by said banks for said Neibert, have been allowed by the commissioners of insolvency, and paid by the surety of Neibert,

he shall pay the surety his dividend according to the par value of the funds in which the notes were paid, at the time of payment, to be ascertained and estimated by the court. It was further adjudged and decreed, that the said Charles G. Dahlgren, administrator as aforesaid, do pay to the separate creditors of the said Neibert, according to the report of R. North, auditor, the sum of four per cent. on each dollar.

Mr. Justice CLAYTON delivered the opinion of the court.

The estate of Joseph Neibert was reported as insolvent, by the administrator, to the probate court of Adams county. The commissioners appointed to audit the claims against the estate, made their report to the September term, 1842, of the court. By this report, claims against Joseph Neibert individually were allowed to the amount of \$449,070, and against him as a partner in two insolvent firms, to the amount of \$247,085. This report was confirmed.

At the December term, 1843, of the court, Stephen Duncan filed his petition, setting forth that there had been allowed him in the report of the commissioners, as a creditor of Neibert individually, a claim to the amount of \$3000; and that there was a great deficiency of assets to pay all the claims. He therefore prayed that the individual estate of Neibert might be first applied to the payment of his individual debts, and that the partnership debts might be excluded from any share of the individual estate, until all the individual debts were satisfied. At the December term, 1844, of the court, a decree was made in conformity with the prayer of this petition, from which the cause comes by appeal to this court.

The doctrine of the courts of equity, which appropriates individual effects to the payment of individual debts, and partnership effects to partnership debts in the first instance, which was applied by the probate judge in this case, we think does not control the mode of disbursing the insolvent estates of deceased persons, because of the statute laws of this state.

The 80th section of the law in regard to the estates of decedents (H. & H. 409) directs, "that when the estate, both real

and personal, of any person deceased, shall be insolvent, or insufficient to pay *all* just debts, which the deceased owed, the said estate, both real and personal, shall be distributed to and among *all* the creditors, in proportion to the sums to them respectively due and owing." Another statute makes "all promises, contracts and liabilities of copartners joint and several." H. & H. 595.

These two laws taken together, in our view give to the creditors of the partnership the same right to satisfaction out of the estate, which individual creditors have. Before the death of either partner, the creditors of the firm may unquestionably recover judgment against any one of them individually, and proceed to make the debt out of his separate estate, just as if it were a separate debt. The death of one or more produces no change of this right. Both classes of creditors are in the same situation, and entitled to an equal *pro rata* proportion of the effects. See *Tucker v. Oxley*, 5 Cr. 40.

Little practical evil or inconvenience can result from this construction. If the partnership creditors choose to proceed against the surviving partners, their claim will be diminished to the extent they may obtain payment from them. If, on the other hand, they go against the estate of the deceased partner, his representative will stand in their place, and be substituted to their rights, in reference to the other partners.

The decree of the probate court is liable to be reversed for another cause. It has been repeatedly decided by this court, that after the report of commissioners of insolvency has been received and allowed, the court cannot, at a subsequent term, open it for any cause, unless the former orders were null and void. See *Herring v. Wellons*, 5 S. & M. 355. The power of the court over it has ceased.

After the final apportionment of the distribution of assets among the creditors, the executor or administrator becomes liable to them for their respective shares. H. & H. 410. The rights of the parties are then fixed, and the probate court cannot, after that term, make any further order, which would be binding upon them.

Another point in the cause has been fully disposed of, by the

Dahlgren v. Duncan et al.

case of *Assignees of Com. and Railroad Bank of Vicksburg v. Norcum & Burwell*, 4 S. & M. 332.

Our conclusion in this case is founded entirely upon the construction of our statutes. We have not attempted to follow the rules which have prevailed, in the English courts of chancery, in the effort to work out an highly artificial equality of rights. These rules, especially in regard to the estates of bankrupts, have been unstable and fluctuating. We think our statutes mark out a plain course, and have endeavored to follow it.

This decision is not intended to conflict with the case of *Bullock v. Dorsey*, decided at the present term. The statutes which govern the two cases are entirely distinct.

The decree is reversed, and the fund directed to be distributed among all the creditors, individual and partnership, in proportion to the amount of their respective claims.

Decree reversed.

Mr. Chief Justice SHARKEY delivered the following dissenting opinion :

I cannot concur in the opinion that the two statutes referred to, have wrought any change in the law on the question involved. The first, (sect. 80 H. & H. 409) I think, was intended for no other purpose than to do away the old distinction between judgment debts, debts due by specialty, and simple contract debts, by making all of equal dignity, without which such as were superior in dignity would have been entitled to priority in payment. The second (sect. 29 H. & H, 595,) is merely a statute of pleading. For the purposes of a suit, it makes contracts joint and several, which before were joint only. But I do not think it changes any rule in regard to satisfaction. At common law, the creditor of a firm was obliged to sue all the partners jointly ; but, having done so, he had a right to have his judgment satisfied out of the individual property of any one of the partners, as well as out of the joint property of all. Lord Mansfield said, that all contracts of partners are joint and several ; every partner is liable to pay the whole. In what proportion the others should contribute, is a matter among themselves. *Rice v. Shute*, 5 Burrow, 2611.

JAMES H. MCCOY *vs.* ZACHARIAH RHODES et al.

The probate court has no jurisdiction of a bill filed by the assignee of an open account against the assignor and the administrator of the administratrix of the debtor in the open account, to compel the administrator to pay the account to the assignee, on the ground that the administratrix in her lifetime had promised the payment of it to the assignee, provided the account should be allowed to her in the settlement of her intestate's estate, and that it had been so allowed; but the administratrix had not paid it; and the assignor claimed it as being due to him.

On appeal, from the probate court of Adams county, Hon. Charles L. Dubuisson, judge.

The appellant, James H. McCoy, filed his bill in the probate court, alleging, in substance, that in the year 1836 the defendant, Zachariah Rhodes, being indebted to him in about the sum of three thousand dollars, paid by him to Charles Lacoste, as the security of Rhodes, and Rhodes having an open account due him from the estate of Joseph Montgomery, deceased, in the parish of Concordia La., in the hands of Mary Montgomery, the widow and curatrix of said Joseph, amounting to the sum of \$392 ⁷/₁₀₀, gave the account to him in part payment of the debt due to him; that he presented it to Mary Montgomery for payment, informing her at the time, that it belonged to him, of which she was also informed by Rhodes, upon which she acknowledged the correctness of the account, but claimed compensation or payment to the amount of \$144, and agreed if that sum should be deducted and that account be allowed her upon settlement of the succession of said estate, she would pay it to him. Afterwards, upon consulting with Rhodes, (who first resisted the credit,) it was finally agreed that it should be allowed, which was made known to her, and she thereupon, in a settlement of the succession of said estate, was allowed the

account on the 1st day of October, 1838. By reason of this allowance, she became indebted and bound to McCoy, in the said sum of \$341⁷⁷/₁₀₀, which she thereupon assumed and promised to pay to him for the consideration aforesaid; that she afterwards died in the county of Adams, Mississippi, (where she resided at the time) without ever having paid the same to him or Rhodes. That administration of her estate was granted to Eli Montgomery, residing in Adams county, who was fully apprized of McCoy's claim, and who in like manner knew from Rhodes that he had given to McCoy said account against the estate of Joseph Montgomery, to be collected for his use, and who was willing to pay it to him as a just demand against the estate of said Mary, but was prevented from doing so by the unjust and fraudulent interference of Rhodes, who was striving to collect it for his own use, with the intent to cheat and defraud McCoy. That Eli Montgomery is unwilling to pay the same to him without the sanction and decree of the court upon a hearing of the parties in interest. The bill makes said Rhodes, and Eli Montgomery administrator of said Mary, defendants, and prays, &c., and upon final hearing that the account be decreed a charge against the estate of said Mary, and that her administrator, Eli Montgomery, be decreed to pay it to McCoy out of the assets of the estate in his hands unadministered.

Eli Montgomery, as administrator of said Mary, filed his account, which stated, in substance, that Joseph Montgomery, of the parish of Concordia, died in 1834; that Mary, his widow, was appointed curatrix, and John F. Montgomery curator of the succession of said estate; that he was requested by said Mary and John to collect all of the claims against said estate, as they were principally in the city of Natchez; that some time in the year 1836, McCoy handed to him an account of Rhodes against the estate of Joseph Montgomery, amounting to three hundred and ninety-two dollars and eighty-seven cents; he handed said account to the curatrix the first opportunity he had, who objected to said account, and stated there should be a credit of \$144 for twelve months' board of Rhodes; he informed McCoy of this fact, and he refused to allow the credit of \$144; he also

informed Rhodes thereof; he also stated he would not allow said credit. The account remained in that situation for twelve months or more before either would allow the credit; they both finally agreed to allow said credit, but at what time he cannot say; of this fact he informed the curatrix as soon as he could, the account still remaining in the hands of the curatrix and curator. It had no order on it, but he understood, about the time the account was handed in, the amount of it, when paid, was to go to McCoy. At the time said curatrix and curator made a settlement of the succession of Joseph Montgomery, they admitted and agreed to settle with Rhodes for said account, allowing him \$285 87, and \$56, making in all \$341 87, which was in the fall of 1838; when they made their settlement Rhodes claimed the amount of his account after deducting \$144. As no order had been given on said account by Rhodes to McCoy, it was taken for granted that it belonged to Rhodes, and the settlement made accordingly with Rhodes, and the amount of the account up to that time was assumed by Mary Montgomery to Rhodes in her individual capacity. She did not pay said amount to Rhodes in her life-time, and it is still due from her estate to Rhodes. After the death of Mary, she having removed to Mississippi, he administered on her estate. McCoy claims the amount of said account as belonging to him. In the present situation of the business he cannot or does not feel authorized to pay it to either McCoy or Rhodes.

It being made to appear to the court that Rhodes was a citizen of Louisiana, and that process could not be served upon him, an order of publication was made, when afterwards, at the September term, 1843, Rhodes, together with Montgomery, appeared by attorney, and filed a demurrer to the bill, which demurrer was sustained by the court, the bill dismissed, and a decree for costs rendered, from which decree this appeal is prosecuted.

The appellant assigns for error first, in sustaining defendant's demurrer; second, in dismissing bill absolutely, and decreeing costs against complainant; third, in dismissing citation against Rhodes, and permitting Montgomery to demur after account filed.

Sanders and Price, for appellants.

The constitution of the state confers upon the court of probates "jurisdiction in all matters testamentary and of administration," &c. The demand here is one of administration, where the representative of the intestate wants the advice of the court to whom to pay an acknowledged demand. The proof, that is the allegations of the bill, admitted upon demurrer and sustained by the account of Montgomery, shows that Rhodes gave the account he had against the estate of Joseph Montgomery to appellant McCoy in part pay of money which McCoy had paid for him as his security; that he finally presented the account to the curatrix in Louisiana, who promised to pay it to him if allowed a certain credit (\$144,) provided it was allowed to her in the settlement of the estate of Joseph Montgomery. It was allowed to her, not as a debt due to Rhodes, but an account as paid by her out of the estate. It is true that it is in the name of Rhodes, but he had passed it by delivery, and informed the agent and the curatrix that the money was to go to McCoy. Before payment she removed to Mississippi and died. McCoy has no recourse against the estate of Joseph Montgomery; she received the benefit of the account as his, and the administrator refuses to pay, but advises him to appeal to the court. He does so properly, as it has general and exclusive jurisdiction in the matter, particularly as he is compelled to resort to a discovery both against the said Rhodes and the said administrator.

The powers of the probate court, so far as its jurisdiction extends, are as ample as those of a court of chancery. *Blanton v. King*, 2 How. 856. If so, a court of equity would, from the circumstances, force the discovery and direct the account to be probated against the administrator, and having taken jurisdiction for that purpose, will extend it, and direct its payment and enforce it, if necessary, either by attachment or execution.

The bill may not be as technical nor apt as might have been desired but with the minute allegations of fact; with a general prayer for relief, the court would decree that McCoy be subrogated to the rights of Rhodes, if the facts of the case do not suffi-

ciently establish his legal right to the demand; and ordered it to be probated as an allowed claim against the estate. Here is no effort to compel the administrator to account; the whole object is to have the claim probated, with such decree or order therewith as may be equitable.

Hewett, for appellees.

Mr. Justice THACHER delivered the opinion of the court.

McCoy filed his bill in the probate court of Adams county, setting out that Rhodes, in 1836, was indebted to him in a large sum, and that, in part payment of this debt, Rhodes gave McCoy an open account which he claimed against the estate of one Joseph Montgomery, deceased, of Louisiana, which estate was then represented by Mary Montgomery, also since deceased. The bill further alleges that the said Mary agreed, with certain deductions, to pay the account to McCoy, provided the account was allowed to her in the settlement of said Joseph's estate, which allowance is also alleged to have been suffered. The bill further alleges that the said Mary subsequently died in this state without having paid the account, and that Eli Montgomery, also a defendant in the bill, was appointed administrator of her estate. The bill charges that Rhodes still claims the amount of the account from said Mary's estate, but prays for a decree for the amount in plaintiff's favor. Eli Montgomery filed an answer to the bill, in which he admits that there was an understanding at a certain time that the sum agreed upon as constituting the account was to be paid to McCoy upon the settlement of Joseph Montgomery's estate, but that upon the settlement taking place, Rhodes claimed the amount of the account for himself, and as upon the account there was no order to pay the amount to McCoy, or any other transfer of the account, Mary Montgomery, in pursuance of her part of the contract, assumed the amount of the account as her individual debt to Rhodes, which still remains unpaid. Subsequently, there appears in the record a general demurrer in behalf of defendants Eli Montgomery and Rhodes. The court decreed that the demurrer should be allowed and the bill dismissed.

The case shows a state of circumstances over which the probate court had not control, and either under the demurrer or the answer, it was bound to decree upon a general principle of want of jurisdiction.

Judgment affirmed.

JAMES ATKINSON vs. JOHN W. FORTINBERRY.

Although the proceedings in causes brought from justices of the peace to the circuit court are *de novo* and can be conducted without any pleadings whatever; yet if the parties undertake to conduct and carry on the cause by the means of pleadings in writing, they will be held to the rules of pleading.

A plea of bankruptcy, which sets forth that, after the making of the promise sued on, the defendant became a bankrupt within the meaning of the statute of bankruptcy, but which sets out no discharge under the law, is bad.

Where a plea has been filed and a demurrer to it sustained, and under the judgment *respondet ouster*, and the plea filed, the demurrer to which is overruled by the court below but sustained on appeal by this court, the judgment of this court will be *quod recuperet*.

On appeal from the Marion circuit court; Hon. Van Tromp Crawford, judge.

James Atkinson sued John W. Fortinberry, before a justice of the peace, on a promissory note for seven dollars and thirty-one cents.

The justice of the peace gave judgment for the plaintiff, and the defendant appealed to the circuit court of Marion county. At the October term of the court, 1843, the plaintiff formally declared upon the note, and the defendant plead. The case came on for trial at the April term, A.D. 1844, of the court, but the jury were unable to agree, and were discharged.

The defendant then obtained leave to amend the pleadings generally, and the cause was continued.

At the October term, 1844, the defendant filed the following amended plea:

<i>James Atkinson, Jun. &c.</i>	} In the Circuit Court of Marion County to October term, 1844.
<i>vs.</i>	
<i>John W. Fortinberry.</i>	

And the said defendant, by his attorneys, comes and defends the wrong and injury when, &c. and says that the said

plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that after making of the said several supposed promises and undertakings, in the said declaration mentioned, to wit, on the 20th day of February, A.D. 1843, he the said defendant became and was a bankrupt, within the true intent and meaning of the statute then in force establishing a uniform rate of bankruptcy throughout the United States, approved August 19th, 1841, and that the said supposed causes of action in the said declaration mentioned, if any such there be, and each of them, did accrue to the said plaintiff before the said defendant so became a bankrupt as aforesaid, and of this he the said defendant puts himself upon the country," &c.

To this plea, the plaintiff demurred, and issue being joined on the demurrer, the court sustained it, and gave judgment that the defendant answer over.

The defendant then answered over, by pleading the same plea as before, except that it was entitled "*James Atkinson v. Fortinberry, Jr.* Marion circuit court at the October term, 1844, (amended plea.)"

The plaintiff then demurred to this last amended plea, and assigned the following causes :

1. Said plea does not show that the said defendant was discharged by a decree in a bankrupt court.
2. Said plea does not show in what court the said defendant became a bankrupt.

The court (issue being joined on demurrer) overruled the demurrer.

The plaintiff was then allowed to join issue on the plea, and a jury being empanelled, decided the issue of fact in favor of the defendant, and the circuit court gave final judgment thereon.

The plaintiff appealed.

Azel Backus Bacon, for appellant.

1. The defendant below was not compelled to submit his defence under formal and written pleas, but having done so, is

bound by them. It has been decided by this court, in a late decision which I have not now before me, that an administrator, although not bound to plead specially, is bound by his plea should he choose to take that course. So in this case, if the defendant chose to plead formally when he was not compellable to plead at all, he is bound by the plea so pleaded, and must answer a demurrer for even technical defects and such as are demurrable specially alone. The defects in the plea first demurred to in this case in the allegation of venue, in failing distinctly to confess while it avoided the plaintiff's action, and in concluding an allegation of new matter to the country, were technical defects; but the plaintiff, by the course of the defendant, became entitled to take advantage of these technical errors. The court then rightfully sustained the first demurrer. But the plea pleaded by defendant after judgment, *quod respondeat oster*, contained the self-same defects, and was equally liable to demurrer. It is difficult to see how the court could have failed to sustain the second as well as the first demurrer.

2. The plea first demurred to in this case was, at least, demurrable for matter purely and entirely of substance. The defendant had chosen to embody his defence in one plea; a plea, too, which he had amended in order to make it sufficient and right, and if that defence was not sufficient in law to bar the plaintiffs' action, he must submit to judgment. The defence thus set up was insufficient, because in his plea of bankruptcy he did not allege that the plaintiff's demand was provable under the bankruptcy, and this cause was specially alleged under the first demurrer of plaintiff. The bankrupt law, section 4, expressly declares that the certificate of discharge by the bankrupt court, shall be pleadable in bar, only when the "debts, contracts and other engagements of such bankrupt," are "provable under this act." And this is expressly asserted in the leading case of *Sacket v. Andross*, 5 Hill's N. Y. Rep. 327.

The first demurrer then was most correctly sustained. But the plea pleaded after judgment *quod respondeat oster*, contained the same defect. It should likewise therefore have been sustained and judgment *quod recuperet* given.

3. The special causes assigned under the second demurrer, were amply sufficient to sustain. The mere being a bankrupt, gave no discharge. The most extended signification given to the word bankrupt, that of one who is broken, would convey no such meaning. The bankrupt law permits the "discharge and certificate" only to be pleaded in bar of claims provable under the bankruptcy. See sect. 4, of bankrupt law. *Sackett v. Andros*, 5 Hill's N. Y. Rep. 327.

The court, in which the discharge was had, should also have been specially set forth in the plea. For the want of this alone the plea was so grossly uncertain, that it was next to impossible for the plaintiff to understand upon what precise ground the defence was predicated. S. C. 5 Hill.

Numerous other defects are apparent on the face of the record, but these are sufficient, it is conceived. The judgment of the court below should have been *quod recuperet* on the second demurrer.

W. P. Harris, for appellee.

The questions to be determined are those raised by the demurrer to the defendant's plea.

The pleader, in the absence of any settled practice in regard to the mode of pleading a discharge under the late bankrupt law of the United States, seems to have followed the form sanctioned by the English courts, under the bankrupt act of George 4th. The effect of a discharge in bankruptcy is substantially the same under both acts, and the same efficacy is given to the certificate which under the English statute has been held to be evidence in itself of all the proceedings which preceded it.

Independent of any statutory provision prescribing the form and substance of the plea, a familiar rule of pleading, taken in connection with the true effect of the bankrupt law of the United States, would, it is thought, lead to the adoption of such a plea as the one resorted to in this instance.

As the certificate is the evidence under any form of pleading, it is certainly unnecessary to encumber the record with any

allegations which are not legitimately proved by it. The allegation that the party became a bankrupt within the true intent and meaning of the act, is proved substantially by the certificate, is really averring what constitutes the defence to the action, and includes necessarily all the facts which the case in 5 Hill, 327, requires to be set forth in detail in the plea.

It is not easy to perceive the necessity of alleging in the plea, that the debt sued on was provable under the commission. The declaration declares the character of the debt. Whether a debt is or is not provable under the commission, is a matter of law for the court to determine, and that question is presented on the face of the declaration in which the character of the debt is set forth.

Aside, however, from these questions, it is insisted, on the part of the defendants in error, that they are not held to the strictness of pleading in a case brought to the circuit court from the magistrate's court. 1 S. & M. 385.

Mr. Justice THACHER delivered the opinion of the court.

Appeal from Marion county circuit court.

The plaintiff sued the defendant before a justice of the peace of the proper county, and recovered a judgment, whereupon the defendant appealed to the circuit court. In this court the plaintiff filed his declaration upon the note which constituted the foundation of the action, to which declaration the defendant filed a plea, which, upon demurrer, was held to be bad, and *respondeat ouster* awarded. Under this leave to plead over, the defendant again plead, and to his second plea the plaintiff demurred, and this demurrer was overruled. The second plea is designed as a plea of bankruptcy and discharge under the general bankrupt law. The plea set forth that after the making of the several supposed promises and undertakings in the declaration, the said defendant became a bankrupt within the meaning of the statute of bankruptcy, but sets out no discharge under said law. The plea was certainly insufficient and bad in not setting out a discharge under the bankrupt law, and should have been so held under the demurrer. Upon a

judgment, sustaining the demurrer, the plaintiff would have been entitled to a judgment as for want of a plea. *Harrison et al. v. Balfour*, 5 S. & M. 301.

It is true, that the proceedings in causes brought from justices of the peace to the circuit court are *de novo*, and can be conducted without any pleadings whatever; but if the parties undertake to conduct and carry on the cause by the means of pleadings in writing, they will be held to the rules of pleading.

Judgment reversed, the demurrer to the second plea in the action directed to be sustained, and a judgment for the plaintiff in error *quod recuperet*, also directed to be entered in this court, the same being the judgment which the court below should have given.

J. D. W. DUCKWORTH et al. vs. URIAH MILLSAPS. .

The return of a sheriff, made upon process in discharge of duty required by law, which shows a reason or excuse for an omission to perform the duty required by the writ, is not conclusive evidence in favor of the officer; on a motion against the officer, predicated on such omission, his return may be impeached.

Where a fiat for an injunction is granted, it is the duty of the clerk not to issue it until the bond required by the fiat is executed; but if he do issue it, the service of it on a party is evidence to him that the preliminary bond has been duly executed; in a motion, therefore, against a sheriff for omitting to make due execution of a writ of *fiery facias*, his return that it was stayed by injunction will be a *prima facie* excuse which will be made conclusive by the production of the injunction, whether an injunction bond were given or not.

Where a subpœna and injunction are combined in the same writ, it is the duty of the clerk, out of whose office the subpœna issues, to indorse upon it that its effect is suspended as to the injunction until the party execute sufficient bond; until the bond is executed, the writ has not the efficacy of an injunction.

In error, from the circuit court of Smith county; Hon. Thomas A. Willis, judge.

Uriah Millsaps entered a motion against Joseph D. W. Duckworth, sheriff of Smith county, and his sureties on his official bond, for voluntarily and without authority omitting and neglecting to make the money on a *fiery facias* which issued on a judgment in favor of Millsaps against Richard Flower, and came to the hands of Duckworth as sheriff. The sheriff and his sureties appeared to the motion; on the trial the writ of *fiery facias* was read, and the return on it was in these words, viz. "Proceedings on *fi. fa.* stayed by a writ of injunction obtained in chancery, this 10th February, 1845. J. D. W. Duckworth, sheriff Smith county." The defendants then introduced and read a writ of injunction issued by and under the seal of

the superior court of chancery, at the suit of Flower against Millsaps, enjoining him from proceedings at law under the judgment, until the further order of the chancellor in the premises; which writ issued in December, 1844. The court below decided that the writ of injunction constituted no defence for the sheriff's failure to make a levy, there being no indorsement on the writ that bond had been given; whereupon the court rendered judgment for the plaintiff in the motion, and the defendants sued out this writ of error.

W. P. Harris, for plaintiff in error.

The errors assigned are, 1. That the court below gave judgment against the defendant, when the default was caused by the writ of injunction from the superior court of chancery. 2. That the judgment was given in favor of the governor in a proceeding not prosecuted in his name.

The motion, on which the judgment below was rendered, is based on the statute H. & H. Dig. 642, sect. 42. The particular language of the section, which authorizes the motion, is as follows: "Or shall make any other *return* upon any such execution, *as will show* that such sheriff, &c. hath voluntarily and without authority omitted to levy the same." It would seem, from this language, that unless the default was disclosed by the face of the return, a motion, in the form of the one under consideration, does not lie. In this proceeding the simple inquiry should be, whether the language of the return shows a default. The truth of the return is not a legitimate subject of inquiry; for the motion in effect admits that it is true in point of fact, but that in law it shows a default. This view is strengthened by reference to the statute H. & H. Dig. 297, sect. 28, which provides for a distinct proceeding against a sheriff, when the truth of the return is controverted. If this construction of the statute be correct, the inquiry is limited to the face of the return. The return on which the motion below was made, is in the following words: "Proceeding on this *fi. fa.* stayed by writ of injunction obtained in chancery." Clearly no just interpretation of this return can make it disclose a wil-

ful or unauthorized omission, so long as we admit that legal process can be restrained by injunction.

The writ of injunction itself was introduced by the sheriff, and appears to be regular in form and absolute on its face, directing in positive terms a suspension of proceedings on the *fi. fa.* in the sheriff's hands. The fact that it contained no indorsement that *bond had been filed*, did not render it inoperative. The statute H. & H. Dig. 515, is merely directory to the clerk. The sheriff had a right to presume that the judge, in granting the injunction, and the clerk in issuing it, had acted in accordance with the law in such cases. It is not the action of the clerk, in making or withholding the indorsement required, which gives or takes away the efficacy of an injunction. The person against whom it is directed must be governed by the face of the writ itself.

The case of *Davis v. Dixon's Adm'r.* 1 How. 64, will doubtless be relied on by the counsel on the opposite side, as asserting a different doctrine. But it will be perceived, from a reference to that case, that the injunction did not apply to the *fi. fa.* in the hands of the sheriff; and it appears also, and the court state the fact, that no bond had been filed.

The statute authorizes the judgment-creditor to recover by motion, in case like the present; and as the proceeding commenced in the name of Millsaps, it is difficult to perceive how the name of the governor has crept into the judgment of the court. It may render the case more imposing, but there is no rule of practice to sanction it.

Mr. Justice THACHER delivered the opinion of the court.

Millsaps filed a motion in the circuit court against the sheriff of Smith county and his sureties, for voluntarily and without authority omitting to make the money upon a certain *feri facias* regularly issued and placed in his hands, and in which said Millsaps was plaintiff. Upon the hearing, the *feri facias* was produced, and it was found to bear this return: "Proceedings on this *fi. fa.* stayed by writ of injunction obtained in chancery." The writ of injunction was likewise produced.

It is contended, that if the return of the sheriff upon a *feri facias* does not show a default upon his part, the motion, in its present form, does not lie. The return of a sheriff made in the discharge of duty required by law, derives its force from being an official act. It is evidence between third persons, and also in some cases in favor of the sheriff, when he is a party, and when he becomes liable by such return. But where the return shows a reason or excuse for an omission to perform the duty required by the writ, it is not conclusive evidence in favor of the officer. Such a rule would be to permit the sheriff to make evidence in justification of his evasion of duty. *Rowand v. Gridley*, 1 H. 210.

In this case, it is true that the return of the sheriff did not conclusively show that he had not "voluntarily and without authority omitted to levy the *feri facias*," but in support of his return he introduced in evidence the writ of injunction itself. This constituted ample authority upon the sheriff to stay his proceedings upon the *feri facias*.

When an injunction is granted, it is sometimes the practice to combine the writ of injunction with the subpœna, in which case it is the duty of the clerk, out of whose office the subpœna issues, to indorse upon it that its effect is suspended, as to the injunction, until the party execute sufficient bond. H. & H. 515, sect. 44. But when a writ of injunction is issued in its separate shape, no such indorsement is required. It is true that a writ of injunction should not be issued by a clerk, except upon bond duly executed, but the service of such a writ upon a party is evidence to him that the preliminary bond has been duly executed. The case of *Davis v. Dixon's Adm'r*, 1 H. 64, as appears by an inspection of the original papers on file in this court, was a case where a sheriff omitted to proceed upon an execution upon the service of a subpœna out of chancery, containing an injunction indorsement upon it, but without the indorsement of the clerk, as required by the statute above quoted. In that case, also, the record contains no evidence that a bond was executed by the proper parties. It will be seen, therefore, that that case differs materially from the one now under consi-

deration, and that the two cases illustrate the principle above set forth.

The judgment of the court below is therefore reversed, and this court, proceeding to give the judgment which the court below should have given, directs that the plaintiff in the circuit court take nothing by his motion.

WILLIAM A. GASQUET et al. vs. CHARLES F. FISHER et al.

It is a good plea in abatement of an action *ex contractu*, that too many persons are joined as defendants; as where three persons are sued as members of a firm, and the plea in abatement sets up that the firm was composed of but two.

And if a demurrer to such plea be sustained improperly, the error will not be cured by a subsequent discontinuance of the suit as to the party improperly joined; it seems it would be otherwise if the discontinuance had taken place before the decision on the demurrer.

In error from the circuit court of Carroll county; Hon. James M. Howrey, judge.

William A. Gasquet & Co. sued Charles F. Fisher, James W. Eskridge, and William C. Eskridge, as joint makers of a note made by Charles F. Fisher & Co.; to which the defendants filed the following plea, attested by oath, viz.: "The said defendants come and defend the wrong and injury when, &c., and pray judgment of the said declaration, because they say that the said several supposed promises in declaration mentioned, if any such were made, were not made by the said defendant, C. F. Fisher, and W. Eskridge jointly with the said William C., and this they are ready to verify. Wherefore, inasmuch as the said William C. was not, at the time of making the said several supposed promises, &c., a partner of the firm of C. F. Fisher & Co., but the same consisted alone of said J. W. Eskridge and C. F. Fisher; they, the said defendants, pray judgment of the said writ and declaration, and that the same may be quashed."

To this plea the demurrer of the plaintiffs was sustained, and the defendants, refusing to answer over, the plaintiffs dismissed their suit as to William C. Eskridge, and took judgment for want of a plea against the others; from which they have sued out this writ of error.

Brooke, for plaintiffs in error.

This was clearly a case of misjoinder, which, as well as of nonjoinder, is always pleadable in abatement. Abatable matter is such as shows that the plaintiff has mistaken the form of his contract, or his time for enforcing it. See 1 Chitty's Pl. 445, 452. The causes of demurrer assigned are frivolous in the extreme, and one of them untrue in point of fact. The plea does give a better writ. It shows who the firm consisted of. As the plea is certainly a good one, the judgment of the court in sustaining the demurrer to it should be reversed.

Cothran and *Howard*, for defendants in error.

In this case there was judgment only against the parties shown to be liable. The plaintiff discontinued as to W. C. Eskridge, who, it was alleged, was not a partner. The plaintiff might discontinue as to him if he were improperly joined. *Minor v. Mech. Bank*, 1 Peters, 46; 2 S. & M. 571. The dismissal as to W. C. Eskridge amounted to a confession and disposal of the plea, and the party should then have pleaded in bar, if he had a good defence. *Webster v. Freeman*, 4 Howard 352; *Babcock v. Scott*, 1 Howard, 100. The error complained of did not injure the defendants. They admit the promise as to themselves.

The rule of pleading relative to partnerships has been materially changed by our statute. One or all of the partners may now be sued. *Nutt v. Hunt*, 4 S. & M. 702. Hence the plaintiffs' right to dismiss as to one. Each partner is liable who was proved to have been a partner, and to have joined in the promise.

But the plea is bad in form, for the reasons stated in the demurrer. See *Babcock v. Scott*, 1 Howard, 100. The plea does not conclude with a verification, and the plea does not give a better writ.

Mr. Justice THACHER delivered the opinion of the court.

W. & J. Gasquet & Co. instituted an action of assumpsit against Charles F. Fisher, James W. Eskridge and William C. Eskridge, as the members of the copartnership of Charles F. Fisher

& Co., upon a promissory note made by Charles F. Fisher & Co. A plea in abatement, under oath, was filed by the defendants, setting up that Charles F. Fisher and James W. Eskridge alone constituted the firm of Charles F. Fisher & Co., and that William C. Eskridge was not, at the time the note was made, a partner of that firm. A demurrer, filed to this plea, was sustained by the circuit court, and the defendants there declining to plead further, the plaintiffs dismissed their action against William C. Eskridge, and took a final judgment against the other defendants.

It is a rule of pleading, that if two or more are sued together, when by law the action should have been brought against any less number of them only, the misjoinder is pleadable in abatement. In this case, so far as technical rules of pleading are concerned, the plea in abatement seems to be sufficiently well pleaded, and the defects assigned upon demurrer, do not seem to exist in the plea.

A good deal of reliance is placed, in argument, upon the circumstance that a *nolle prosequi* was entered as to the defendant, William C. Eskridge, after the judgment upon the demurrer, and the refusal to plead upon the judgment of *respondeat ouster*. Had the *nolle prosequi* been entered before any judgment upon the demurrer, such an amendment would have been within the statute, and warranted by it, but such an amendment would have come too late after a proper judgment overruling the demurrer. Amendments can only be made before verdict, and a judgment overruling the demurrer is conclusive of the case.

Judgment reversed, and this court, proceeding to give the judgment which should have been given by the court below, direct that the demurrer be overruled, and that the plaintiffs below take nothing by their suit.

LOUIS A. CAILLARET vs. ARNI BERNARD.

The interest allowed by law to the widow, in the personalty of her deceased husband, is considered by our statutes as dower therein ; and must be proceeded for, in the probate court, in the mode pointed out by the statute. H. & H. 421, § 123.

A petition therefore, for dower, in personalty, that does not set forth in what the personalty consisted, nor that the deceased died in the county where the petition was filed, nor that the property in which the interest was claimed, is defective and liable to demurrer ; in such case, however, leave to amend the petition should be granted by the court.

In error from the probate court of Harrison county ; Hon. George Holly, judge.

The defendant, in error, filed the following petition in the court below : " Your petitioner, Adelle Bernard, wife of Arni Bernard, widow of Adolphe Caillaret, deceased, respectfully sheweth to your honor, that her late husband, Adolphe Caillaret, died intestate, and without lawful issue ; she therefore prays that commissioners may be appointed to set aside her dower or legal rights in the personal property belonging to said estate, to which, under the laws of this state, she is entitled to receive therefrom, and as in duty bound, your petitioner will ever pray, &c."

Louis Caillaret, the administrator of Adolphe Caillaret, appeared and demurred to the petition ; the probate court, however, overruled the demurrer, and appointed the commissioners, and the defendant prosecuted this writ of error.

W. A. Champlin, for plaintiff in error.

1. The petition sets out with the allegation, that Adolphe Caillaret died without issue, but does not say when or where, and that therefore she " prays that commissioners may be ap-

pointed to set aside her dower or legal rights in the personal property belonging to said estate, to which, under the laws of this state, she is entitled to receive therefrom."

Now we have three statutes which allows the widow some property out of an intestate estate, the one provides that she shall have provisions for one year. But it is presumed that if that is what she desired by this petition, she should have shown by her petition that there was provisions on hand, and what they were, and that the year had not expired from the decease of the husband. In this case more than two years had expired.

2. Then there is another law that allows the widow such property as is exempted from execution, provided the same shall not be more than of the value of fifty dollars. But this law only applies to insolvent estates, and if this is what she claims as "dower or legal rights," she should have alleged that the estate was insolvent, which is not the case.

3. And thirdly, the statute provides that in case of no children of the marriage, the wife shall inherit one half of the personal estate, but she does not take this as dower, but as a distributee, and if this is what she meant by the petition to claim, she should have alleged that twelve months had elapsed since the grant of letters of administration, and tendered a refunding bond.

In fact, from the mere inspection of the petition, and of its informality and uncertainty, it is believed that this honorable court will at once see that no decree could be made upon it, and consequently, that the decree made by the probate court below is erroneous.

Mr. Justice THACHER delivered the opinion of the court.

A petition was filed in the probate court of Harrison county, in behalf of Adelle Bernard for her dower or legal rights in the personal property of Adolphe Caillaret, deceased, a former husband of the petitioner. A demurrer was filed to this petition, attacking it for defects of form, which was disallowed by the court below, and an order made, appointing three commission-

ers to set off to the petitioner her rights as prayed for in her petition.

The form of petition for dower is regulated by the statute, H. & H. 352, sect. 43. The widow must petition the court, setting out the nature of her claims; and if there be real estate, particularly specify the lands, tenements and hereditaments, in which dower is claimed. But if there be no real estate, that circumstance need not be set forth. It will be seen, from this statute, that it is under the writ of dower that the portion of the widow in the personalty of her husband's estate is to be allotted and set off to her. Our laws abolish the common law proceedings for dower; and, although the widow's interest in personal estate is not dower by the common law, still it is so considered by our statutes, it being a portion which the law gives a widow, in consideration of the marriage.

In this case, the petition does not seem to have been filed under the statute H. & H. 421, sect. 123, authorizing the probate court to appoint three commissioners to select and set apart to the widow one year's provisions out of the stock of provisions and effects of the deceased husband. That statute requires a direct application from the widow for that purpose.

The petition can be regarded only as praying for the dower in the personalty of the estate; and was certainly defective in not stating that the deceased had personal property, and in what it consisted; and especially in not stating that the deceased died in Harrison county, or that the property was there, in order to show that the court had jurisdiction. The demurrer should therefore have been allowed; but as the statute H. & H. 352, sect. 44, declares that the proceedings upon such petitions for dower shall be in a summary way, it is a case where leave for amendment might with great propriety be permitted by the court.

Judgment reversed, the demurrer allowed, and the cause remanded for further proceedings.

DOE ex dem. LOUIS A. CAILLARET vs. ARNI BERNARD et UXOR.

It is a principle of evidence that when two writings refer to each other, with a view to the construction of either, being cotemporaneous and kindred in respect to subject-matter, they are deemed one instrument, when the controversy is between the original parties and their representatives; where, therefore, a deed, conveying the absolute fee in real estate, was executed, and at the same time the grantee executed a paper, reciting that he received the property charged with the settlement of the just debts of the grantor; *held*, that the latter paper was correctly admitted in evidence, in an action of ejectment by the grantee in the deed, on the part of the defendant, to show that the grantee had but a trust in the property; and that therefore the widow of the grantor, who had intermarried with him since the deed, was entitled to dower in the property.

Where the record does not purport to set out all the testimony, this court will presume that all written evidence spread out in the record, was properly proved in the court below, to render it competent testimony.

Where a grantor, in a deed which conveyed the fee-simple in land to the grantee, took from the grantee an acknowledgment that he held the land subject to the just debts of the grantor, and charged with their settlement, and the grantor subsequently marries and dies, his widow will be entitled to dower in such realty; and if the property thus conveyed be the mansion-house of her husband, in which he was residing at the time of his death, she may, even though her dower has not been formally allotted to her, set up her possession as widow and dowress of the mansion-house, in bar of an action of ejectment by such grantee; and even though it appear in proof on the trial that the premises are held in possession by a tenant of the widow, yet if it do not appear that she has given a lease or actual transfer of her privilege of possession, and she be let in to defend in the action, it is competent for her to rely on her right of possession under the statute, (How. & Hutch. 353, § 47.)

It is no ground of objection to a verdict and judgment in ejectment, that the record does not show a plea of not guilty, where the parties appeared and tried the cause upon its merits.

IN error, from the circuit court of Harrison county; Hon. V. T. Crawford, judge.

John Doe, on the demise of Louis A. Caillaret, brought an action of ejectment, and served the notice on William Jourdan,

320 HIGH COURT OF ERRORS AND APPEALS.

Doe v. Bernard et ux.

the tenant in possession of the premises. At the March term, 1844, of the court, it was ordered, by consent of both parties, that Arni Bernard and Adelle Bernard should be made defendants, and the ordinary consent-rule was entered into, agreeing, among other things, to plead not guilty, but the plea was not filed.

At the April term, 1845, the jury found for the defendants. The plaintiff below filed a bill of exceptions, from which the following facts appear. He read a deed from John Delancy and Adelle Delancy his wife, to Adolphe Caillaret, of the premises in controversy, and a deed from Adolphe Caillaret to himself, both deeds conveying the property in fee-simple. The defendants admitted the identity of the premises; when the plaintiff proved by William Jourdan that he was then in possession of the property, as tenant of the defendants, and had been in possession of it ever since about three months prior to the commencement of the action; that the defendants did not reside upon the premises, and had no other possession of it than what they held through him as their tenant. It was admitted that Adelle Bernard, the defendant, was the wife of John Delancy, at the time of the execution of the deed from him to Caillaret, and the widow of the said Caillaret by intermarriage with him, subsequent to the execution of the deed from Adolphe Caillaret to Louis Caillaret, and that Adolphe Caillaret died in possession of the premises in controversy.

The defendant then offered in evidence "an instrument, purporting to have been made by Louis A. to Adolphe Caillaret." This instrument was in the French language; the following translation of it was admitted to be correct, viz.:

"I, the undersigned, declare, that on the 30th day of September, 1839, my brother, Adolphe Caillaret, has made to me a sale of all his property, not for the purpose of defeating his legitimate creditors, with whom he charges me to settle, but to render unavailable all unjust demands against him during his voyage to France, which he is obliged to take in haste.

(Signed,)

L. A. CAILLARET."

The plaintiff objected to the admission of this instrument, but his objection was overruled, and he excepted, and embodied the foregoing evidence in the bill of exceptions.

Various instructions were asked which, and the action of the court upon them, it is not deemed necessary to set out, as they are not noticed in the opinion of the court.

On the rendition of the verdict for the defendants, the plaintiff prosecuted this writ of error.

Champlin, for appellant,

Cited the following authorities: *Brown v. Weast*, 7 How. 181; 2 Esp. Nisi Prius, 36; 2 Johns. 84; Ibid. 221; 3 Ibid. 422; 8 Ibid. 488; 1 Kent. Com. 61, 304, and note, also note at 310; 2 Story's Eq. 275; 1 Chit. Pl. 219; 11 Johns. 487; 3 Burr. 1901; 1 Term R. 758; *Weakely v. Bucknell*, Cowper, 473; *Lowther v. Andover*, Brown's C. C. 396; 7 Term R. 247; 8 Ibid. 2, 122, 123; 5 East. 138; *Wallis v. Smith's Heirs*, 2 S. & M.; *Wooldridge v. Wilkins*, 3 How. 370, 371; *Beall v. Campbell*, 1 Ibid. 24; *Wilkinson v. Patterson*, 6 Ibid. 193.

John Henderson, for defendant in error.

E. Fourniquet, on the same side.

1. The defendants, Arni Bernard, and Adelle Bernard, his wife, resisted the plaintiff's title, upon the ground that the deed from Adolphe Caillaret to Lonis A. Caillaret, although absolute on its face, was, nevertheless, held under a secret trust; and that the property in question was held by Lonis A. Caillaret as trust property only. And as trust property, Adelle Bernard, widow Caillaret, (there having been no children by the marriage,) was entitled to a dower interest of one half of all the said property. How. & Hutch. 351, sect. 41. And was also entitled to hold possession of the premises, until her dower had been duly set apart to her. How. & Hutch. 353, sect. 45-47.

2. The existence of a trust may even be established by parol, and thus against the answer of a defendant. 1 Johns. Ch. R. 582, 594. Certainly, then, the court below did not err in al-

lowing the trust in question to be established, and the absolute deed qualified, by an instrument in writing, or defeasance, bearing even date with the deed, and purporting to have been executed by the grantee, Louis A. Caillaret.

The genuineness of the defeasance having been questioned, the court properly referred the question to the jury; it was their province to decide thereupon. 1 Greenl. Ev. 197; 2 Stark. Ev. 263.

3. When the judgment of the court below is assailed, as in this case, and it is charged with the admission of the defeasance, "without the necessary preliminary steps having been taken for its introduction, viz. proof of its genuineness, or that it was signed by Louis A. Caillaret," all proper evidence to support such a charge must be embodied in the bill of exceptions. The appellate court will consider, unless such evidence is duly embodied in the bill of exceptions, that there were facts before the court below which justified the admittance of the instrument of defeasance.

4. So also with regard to the alleged want of a plea. The record shows that the case was submitted to a jury, and a judgment rendered in favor of the defendants, Bernard and wife. The appellate court will presume that a plea was duly filed, and the pleadings below regularly made up. The want of a plea should have been taken advantage of in the court below; having submitted this case to a jury, the error is cured by the statute of jeofails. How. & Hutch. 591, sec. 11. "No judgment, after the verdict of twelve men, shall be stayed, or reversed for any mispleading, insufficient pleading, misjoinder of issue," &c. &c. 7 Yerg. R. 452.

Mr. Justice THACHER delivered the opinion of the court.

The plaintiff instituted his action of ejectment, to recover certain premises in the town of Biloxi, in Harrison county. He claimed under a deed in fee simple from his brother, Adolphe Caillaret, since deceased, who was a former husband of Adelle Bernard, one of the defendants. This deed was executed prior to the intermarriage of the grantor, Adolphe Caillaret, with the

Doe v. Bernard et ux.

defendant, Adelle Bernard, but the said Adolphe occupied the premises thereby conveyed, as his dwelling-place, at the time of his decease. The defendants, one of whom, as aforesaid, was the widow of the plaintiff's grantor, set up the defence that the conveyance of the premises to the plaintiff was intended only as a trust estate in him for certain purposes. This was not an attempt to set up an equitable title or interest against a legal title, but merely to show that the conveyance to the plaintiff was in fact a trust estate, and not absolute.

The proof that the property in question was conveyed to the plaintiff in trust, is contained in an acknowledgment, signed by the plaintiff, in which he avers that the property was conveyed to him by his brother, without any view to defeat the claims of his just creditors, but the reverse, since he, the grantee, was charged to settle with all such creditors.

It is a principle of evidence, that where two writings refer to each other, with a view to the construction of either, being contemporaneous and kindred in respect to subject-matter, they are deemed one instrument. This is the case where the controversy is between the original parties and their representatives. Phil. Ev. Cow. & Hill's notes, 3, 1420, note 547; 1 Greenl. Ev. 334.

It being considered correct upon principles of evidence to have permitted the introduction of the instrument, showing the creation of a trust, the objection that the instrument by which this proof was sought to be substantiated was not fully proved, cannot avail, because there is nothing in the record that purports to set out the whole evidence upon the trial, and we must therefore presume that the court admitted it to the jury only upon the production of sufficient verification.

The deed of Adolphe Caillaret, having been qualified as conveying a trust estate, and not being absolute, although executed anterior to his marriage with the defendant, Adelle Bernard, continued the property, subject to the widow's dower. How. & Hutch. 353, sect. 47. It does not appear by the record that dower had been assigned to the widow of the plaintiff's grantor, and she was therefore entitled to the full possession of the

his

dwelling-house and appurtenances in which her husband most usually dwelt, next before his death. H. & H. 353, sect. 45.

Upon the trial there was evidence to show that the premises were held in possession by a tenant of the widow, but there was no evidence of any lease or actual transfer of her privilege of possession. Inasmuch, also, as she was let in to defend in the action, it was competent for her to defend upon her own right of possession. The circumstances of this case differ from those of *Willis v. Doe ex dem. Smith's Heirs*, 2 S. & M. 220.

The objection that the record does not show a plea of "not guilty," is not a ground of error, the parties having appeared and tried the cause upon its merits. *Huddleston v. Garrot*, 3 Humph. 629.

Judgment affirmed.

JAMES B. TRULY et al. vs. JOHN LANE et al.

A court of equity has jurisdiction of a bill to recover of the maker the amount of a lost note ; but it seems the court will require a bond of indemnity from the complainant not only against the note itself, but also against the damages and accumulated expenses of another suit.

Where a bill is filed to recover the amount of a lost note, the chancellor may direct an issue to be tried by a jury to ascertain the fact of loss.

Where, in a bill to recover the amount of a lost note, no objection was made in the court below before the hearing, of a defect in parties, it is too late to urge that defect in the high court.

The court of chancery has power to allow amendments of the pleadings at any stage in the progress of the cause ; such amendments are in his discretion, and when made will not be inquired into by this court.

On appeal from the decree of the superior court of chancery ;
Hon. Robert H. Buckner, chancellor.

John Lane and John A. Lane, partners, under the style of J. & J. A. Lane, filed their bill in the superior court of chancery, against James B. Truly, Richard Harrison, Philip O. Hughes, and Thomas Hinds ; charging that in the latter part of 1833 or early part of 1834, they were the holders by indorsement of a note for nine hundred and eight dollars, made by Truly, Harrison, John W. Piper, Philip O. Hughes, Thomas Hinds and Abraham Maybury, payable to John Buel, and by him indorsed, dated the 4th day of January, 1833, and due on the 1st of January, 1835. That early in the spring of 1834, their store and counting-house was consumed by fire ; and the note was in an iron safe in their counting-room, and also consumed ; after the maturity of the note, on the 2d of March, 1835, they made affidavit of the ownership and burning of the note, and called on the makers for payment, but all of them being securities, except Truly, refused to do anything, and referred them to him, and he being insolvent, would not speak

Truly et al. v. Lane et al.

seriously of the matter; they then put the note into the hands of an attorney, who commenced suit, but before the case came on, he died, and another attorney, who was counsel for defendants, became his administrator, and became possessed of the papers relating to the suit, and when it was called, suffered a nonsuit. The complainants then employed other counsel, who brought suit upon the note, but for want of testimony were compelled to suffer a nonsuit. Complainants say they are informed that defendants deny the existence of any such note, but admit the existence of a similar note for \$809, or eight hundred and eighty dollars, or some other sum; that they were perfectly willing to accept such sum as defendants might say was the true amount; but the defendants positively refused to settle on any terms for any sum; that they do not know of any evidence by which they can prove the existence of the note, and that a discovery is necessary to ascertain, by the answer of the defendants, its existence. They therefore call upon defendants to answer the allegations of the bill, and propound special interrogatories. They pray a decree that the defendants pay complainants such sum of money as may be ascertained to be due to complainants, and for execution therefor, upon their giving such bond for indemnifying as the court may require; and for general relief.

The defendant, Truly, answered and combined with his answer a general demurrer; he says he does not know or admit that complainants ever became the holders by indorsement of such a note, but expressly denies the same to be true; he denies that such note was burned by fire, for none such ever existed; denies the truth of the affidavit charged by the bill as having been made of the burning of such note; he admits that two suits at law had been instituted against him and his co-defendants by complainants, and the same being groundless, they were forced to submit to nonsuit; he denies the existence of such note, and does not admit the existence of a similar note for \$809 or \$880, as belonging to complainants, or for any other sum. He admits that in January, 1833, he and others as indorsers, or securities, he does not recollect which,

executed to one John Buel their promissory notes, the first for \$908, payable in 1834, the second for \$809, payable in January, 1835, and the third for \$908, payable in January, 1836. That he believed that all of the notes have been paid — he is confident that two of them have been paid; he does not know or believe such note was assigned to complainant or destroyed by fire, and if they ever held such note, he requires full proof, and resists any decree against him; he says that said claim is stale, and if such ever existed, which is not admitted, and if any cause of action ever accrued to complainants, it accrued at the time of the supposed burning, since which time more than six years had intervened prior to the institution of this suit, and he pleads and relies upon the statute of limitations in bar of the suit, and insists if the complainants had in law any right of discovery, they should have applied for it on the equity side of the circuit court where he had on previous occasions been impleaded on the same demand.

The defendants, Hughes, Hinds, and Harrison, severally answer and demur; they deny, in the same manner with their co-defendant Truly, the possession, ownership or destruction of said note by fire; they admit that complainant called upon them, alleging the loss of such note, and they refused to acknowledge any accountability, &c. That some time in the year 1833, they became bound as the security of Truly, together with others, in three promissory notes, the amount of which were about 8 or 900 dollars each, payable at periods of one, two, and three years, but their precise amounts or dates, or days of payment, they do not recollect or know; they know nothing of the payment or non-payment of said notes; they have uniformly heard that two of said notes were paid, which two they do not know; they have also heard that the other was paid, and that it was not paid — which was true they do not know, and require full proof; they do not recollect or know whether the note was a joint or indorsed one; they rely upon the statute of limitations.

The deposition of James G. Mayfield, which was the only one taken, was in substance, that he had seen a note, drawn by

Truly et al. v. Lane et al.

James B. Truly and the other defendants named in the interrogatory to him, in favor of John Buel; he could not say precisely whether the amount of it was nine hundred and eight or eight hundred and nine dollars, but he was positive as to its being for one of these sums; the note was dated on the 4th day of January, 1833, and payable 1st day of January, 1835.

At the time he last saw the note, it was held by J. & J. A. Lane, in Vicksburg, and was burnt with their books and papers on the 10th of February, 1834, when their store-house was burned down. J. & J. A. Lane were the just owners of the note at the time it was burnt, and still were the rightful claimants of its amount; unless they have transferred it since, which deponent believes they have not done. The note was indorsed by John Buel; he did not know the signatures on said note with the exception of John Buel, which he knew to be genuine; he was at the time in the employ of complainants, and had been from 1831 up to 1835, and knew that J. & J. A. Lane sold to Buel a piece of property, eight miles from Vicksburg, known as the Mount Albion tavern, and received three notes, all drawn by the same parties, the note described in 1st interrogatory, being one, the other two were sued on and collected in the Jefferson circuit court; all three of the notes were indorsed by Buel; he had free access to Lane's books and papers, and frequently saw this note, with the others mentioned above.

In answer to cross-interrogatories, he stated that he never saw either of the parties write or sign their names except Buel; "he frequently saw the note; it was in the store-house previous to the fire, and all their notes, books, accounts, and some money were burnt; he infers this note was among the rest."

The chancellor directed an issue to be tried by jury, on the following points:

1. Whether defendants made and executed to John Buel, such a promissory note, as that set forth in complainant's bill.
2. Whether the complainants were the *bona fide* holders of such note, as averred in their bill, and entitled to the recovery thereof.

Truly et al. v. Lane et al.

3. Whether the note has been lost or destroyed, as averred in the bill of complaint. And referred the same to be tried by a jury in the circuit court of Adams county. Upon which issue the jury returned the following verdict:

"We of the jury find that the said defendants did make and execute to John Buel a note for the sum of eight hundred and nine dollars, dated January 4th, 1833, and payable on 1st day of January, 1835; that the complainants were *bona fide* holders of said note, and entitled to recovery thereof, and that said note has been lost or destroyed, as averred in the bill of complaint."

On the return of this verdict, the complainants filed their amended bill, in which they state the filing of the original one, against the defendants to recover the sum due on a lost note, which in the bill is described as a joint note, made by the defendants and others for the sum of nine hundred and eight dollars, dated January 4th, 1833, payable 1st January, 1835. At the time of filing which original, they believed they described the note correctly, which was done from memory, but since which time, more particularly since last term of this court, they have become satisfied the note was for the sum of eight hundred and nine dollars, instead of \$908, and prays for the same relief.

Afterwards, the case being submitted for private hearing, the court decreed in favor of complainants, and referred the case to a master to compute the interest on the note for \$809, who reported the balance or amount due, at \$1456 20, which was confirmed. Upon which the court entered a final decree in favor of the complainants for the amount reported against Howell Hinds, administrator, &c. of Thomas Hinds, deceased, out of the goods and chattels, &c. of Thomas Hinds, and James B. Truly, Philip, O. Hughes and Richard Harrison, to be paid within ten days, or that they have execution therefor.

A bond of indemnity, with the following condition, is filed in the record, viz.

"The condition of the above obligation is such, that whereas the above-bound obligors, by the order and decree of the supe-

Truly et al. v. Lane et al.

rior court of chancery of the state of Mississippi, sitting at Jackson, at the December term thereof, in the year eighteen hundred and forty-four, have recovered of and from the said defendants, — Howell Hinds, as administrator, &c. of Thomas Hinds, deceased, James B. Truly, Richard Harrison, and Philip O. Hughes, — the sum of one thousand four hundred and fifty-six dollars twenty cents, with eight per cent. thereon from the 14th day of the present month, until paid, on account of a certain promissory note for the sum of eight hundred and nine dollars, dated the 4th day of January, 1833, and payable on the 1st day of January, 1835, made by James B. Truly, Richard Harrison, Thomas Hinds, John W. Piper, Philip O. Hughes, and Jesse Mayberry, in favor of John Buel; which note is represented to have been indorsed by said Buel to J. & J. A. Lane, and to have been destroyed by fire. Now if the said obligees shall pay the said sum of money mentioned in said decree, and the said obligors shall at all times thereafter save harmless and indemnify the said obligors from all suits, claims, demands and damages suffered or to suffer on account of said promissory note, then the above obligation to be void, otherwise to remain in full force and virtue.”

The defendants appealed from the decree of the chancellor.

Sanders and Price, for appellants, insisted,

1. That the chancery court had no jurisdiction of the bill. On this point they cited H. & H. 606; Barstow's Eq. 56; 1 Story Eq. 84, 85; 2 Story Eq. 700, § 1483; 704, § 1488; 2 Story Eq. 2, § 690.

2. That the bill being for discovery and relief both, was demurrable, in not bringing all the parties before the court; that the representatives of Piper and Mayberry were not parties to the suit below.

3. The bill being for discovery, the court could not grant relief that conflicted with the answers. 2 Story Eq. 2, § 690.

4. That the direction of the issue to a jury, on the coming in of an answer to a bill of discovery, to ascertain the truth or falsehood of the answer, was erroneous.

Truly et al. v. Lane et al.

5. That the amendment filed after the verdict was rendered, was irregular.

Montgomery and Boyd, for appellees, in reply.

1. The jurisdiction of a court of chancery, in cases of lost notes, is unquestioned; the only doubt in the law-books is as to the jurisdiction of a court of law.

2. That all lawyers were agreed that a court of chancery had power to direct an issue to ascertain a fact upon which he doubted; and that it was allowed by statute H. & H. 510, § 27.

3. That the amendment of the bill made below was not material, or necessary; the original bill was sufficient of itself; that the amendment was made for the protection and safety of all parties, to make the bill correspond with the verdict; and the court had the power to make it.

Mr. Justice CLAYTON delivered the opinion of the court.

This was a bill filed in the superior court of chancery, for the discovery of the amount of a note alleged to have been destroyed by fire, and for a decree for such amount as might be found due.

The material point made in the defence is, that there is an adequate remedy at law, and that therefore a court of equity has no jurisdiction.

The cases upon this point are not uniform, and are involved in some degree of embarrassment. In the case of *The East India Company v. Boddam*, 9 Ves. 468, a party was permitted to recover in equity upon a lost bond. Jurisdiction was entertained, not only because no profit could be made of the lost instrument, but because the defendants had a right to indemnity not only against the bond, but against all costs and damages to which they might be subjected in another suit. In *Mos-sop v. Eador*, 16 Ves. 430, a bill was dismissed which was filed to coerce payment of a promissory note which had been lost. But in *Hansard v. Robinson*, 7 Barn. & Cress. 90, it was held that the indorsee of a lost bill of exchange could not recover upon it, in a court of law, and that the remedy was in equity.

In *Davis v. Dod*, 4 Price Ex. Rep., it was holden that the indorsee of a lost bill might recover upon it in equity. The chief baron, Richards, said, "It does not become me to say whether the plaintiff has or has not any remedy at law, but even though he should have such a remedy, he has also a remedy here, and if he had commenced an action at law, the defendant might have restrained him by injunction from proceeding, and for this obvious reason, because a court of law could not compel him to give security, which a court of equity would hold he was entitled to." He also applies the rule as well to instruments not negotiable, as to those which are. In *McCartney v. Graham*, 2 Simons, 285, it is said that *Mossop v. Eador* is overruled in *Hansard v. Robinson*, and a bill was sustained to recover on a lost bill of exchange. Judge Story is in favor of the jurisdiction in equity, as well in regard to instruments not negotiable, as those which are, not only because it can require indemnity against the instrument itself, but also against the damages and accumulated expenses of another suit. Eq. Jur. §§ 85, 86, p. 103.

From this view of the authorities, we are of opinion that the jurisdiction in equity is established and ought to be sustained. The bond of indemnity in this case was of the required character.

The objections taken to the proceedings in the chancery court are not valid. The directing an issue to be tried by a jury was not erroneous; the chancellor had a right to adopt that mode to inform his conscience. The objection to the want of other parties was not urged before the hearing; it is too late, in a case like this, to rely upon it now. The amendment of the bill after the verdict is no cause for reversing; the amendment itself was unnecessary. But amendments are discretionary with the court below, and this court does not attempt to control the exercise of that discretion.

The decree is affirmed.

JOHN D. JAMES vs. LYDIA DOWELL.

To authorize the issuance of an attachment against the property of a non-resident of this state, under the statute H. & H. 550, § 16, it is not necessary that the affidavit should state the actual place of residence of the defendant; it is sufficient to state his non-residence, and the impossibility of a service of the ordinary process of law.

In a case commenced by attachment, the defendant has a right to plead in abatement, when he appears and replevies the property attached.

The statute, H. & H. 597, § 43, which declares that it shall be lawful for a defendant, in any suit, to plead as many pleas in bar of the action as he shall choose, although some of said pleas may be to the party, or to the character of the parties suing, embraces pleas in abatement.

A plea in abatement to an attachment, which alleges that the defendant is a citizen of the state of Mississippi, but does not allege that he resides in the county in which the suit is instituted, and thereby show that the ordinary process of law could have been served upon him, is bad on demurrer.

The pendency of one attachment may be pleaded in abatement of a subsequent attachment, between the same parties for the same course of action, in the same county.

ERROR from the circuit court of Adams county; Hon. C. C. Cage, judge.

This was an attachment sued out by Lydia Dowell, before a justice of the peace, on the 6th day of September, 1843, against John D. James as a non-resident of Mississippi, for \$927. The affidavit states, that the "said John D. James resides without the limits of the state, and is not an inhabitant of the state of Mississippi, so that the ordinary process of the law cannot be served upon him." On the attachment, a garnishment was issued against Charles Clarke and Josiah Lawton, directed to the sheriff of Jefferson county, which was returned, executed as to the first, and not found as to the other. The attachment was levied upon a slave of the defendant, which was afterwards replevied. The plaintiff in attachment filed her declaration to

the ensuing November term, claiming damages for the alleged false warranty of a slave named John, to the amount of two thousand dollars. The defendant, at the same term, moved the court to quash the attachment, which motion was overruled, and the cause continued by the court. Before the next term, to wit, on the 23d day of April, 1844, the defendant in the court below filed three pleas in abatement, the first, averring "that the said defendant, at the time of the issuance of the said writ, to wit, on the 6th September, 1843, was a citizen and inhabitant of the state of Mississippi, so that the ordinary process of the law could have been served upon him before the return day thereof." The second averring, "that at the time of the issuance of the said writ of the said plaintiff, to wit, on the sixth day of September, in the year of our Lord one thousand eight hundred and forty-three, he the said defendant did not reside without the limits of this state, to wit, the state of Mississippi, on the contrary he avers, that he then was a citizen of the said state, and an actual inhabitant of the said county of Adams, between the test and return day of said writ, and yet is a citizen and inhabitant of said state, and that he the said defendant could have been served personally with process of this court." And the third averring, "that before the issuing of said writ of the said plaintiff, to wit, on the 22d day of July, in the year of our Lord one thousand eight hundred and forty-three, the said plaintiff sued out a writ of attachment before and from Jacob A. Van Housen, Esq., a justice of the peace of the county of Adams, and state of Mississippi, returnable to the circuit court of Adams county, at the court-house thereof, on the fourth Monday in November, A. D. 1843, against the said defendant in a certain plea of trespass on the case upon the same identical promises and undertaking, as by the record thereof remaining in the said court more fully appears, and the said defendant further saith that the parties in this and the said former suit are the same, and not other or different persons, and that the supposed causes of action in this and the said former suit are the same, and not other or different causes of action and that the said former suit so brought and prosecuted against

James v. Dowell.

him the said defendant by the said plaintiff as aforesaid, is still depending in the said circuit court of Adams county." These pleas were verified by oath. The plaintiff demurred to all three of them, and set down as cause of demurrer, 1. That a plea in abatement in a suit commenced by attachment is not warranted by law. 2. That three or two pleas cannot be pleaded in abatement in the same suit by the same defendant at the same time, but he can plead only one plea in abatement. 3. There is not sufficient cause shown or set forth in either of said pleas in abatement for the quashing of said writ and declaration or either. And that said pleas are informal and insufficient in other respects. The court below sustained the demurrer to all the pleas, and entered a judgment of *respondeat ouster*. The defendant below then pleaded the general issue, and afterwards there was a trial, and verdict and judgment rendered for the plaintiff, from which this writ of error is prosecuted.

Sanders and Price, for plaintiff in error.

The first question for the consideration of this court is the correctness of the decision of the court below, in refusing to quash the attachment on the motion of the defendant below. An attachment, as the law stood at the time of the suing out the one in this case, could only issue upon oath or affirmation, that his or her debtor, "hath removed, or is removing out of the state, or so absconds, or privately conceals him or herself, that the ordinary process of the law cannot be served upon such debtor." H. & H. 548, § 11. Here are four several states of case upon which an attachment might issue, neither of which is embraced in the affidavit made in this case. The averment that he the defendant "resides without the limits of the state, and is not an inhabitant of the state of Mississippi," does not literally or substantially show that he "hath removed," or "is removing out of the state," or that he absconds or privately conceals himself. This court has decided that the law in such case must be substantially pursued, although it is not necessary to adopt the precise language of the statute. *Willis v. Wallace*, 3 How. 254. Nor does this case come within the provisions of

James v. Dowell.

the 16th section of the act, which provides "when any person, who shall be an inhabitant of any state, territory or country without the limits of this state, so that he cannot be personally served with process, shall be indebted to any person, a resident of this state, and hath any estate, &c." H. & H. 550. Under this section the affidavit should show that the debtor was not only an inhabitant of another state, territory, or country, but what state, territory or country, "so that he cannot be personally served with process;" this latter part is the substantial requisition, and should be made out, for many obvious reasons, as to the advertisement, its time, and where, &c. But this court has said, in the case of *Hosey v. Ferriere*, 1 S. & M. 664, "The laws in regard to attachments confer extraordinary remedies, and are to be confined to the cases embraced in their express terms." See *Saffarace v. Bennett*, 6 How. 277.

Our statute, on the subject of pleading, declares, "The defendant in any cause may plead as many several matters, either of law or fact, as he may judge necessary to his defence: provided he be not admitted to plead and demur to the whole." H. & H. 589. No objection to the form or substance of either of those pleas are assigned or set out, and none is perceived. And this court has decided, since the abolition of imprisonment for debt, that a defendant in attachment had a right to appear and plead; and that a plea in abatement cannot be disregarded or treated as a nullity. See *Rowley & Gauze v. Cummings & Spyker*, 1 S. & M. 346. See also *Amos & Roe v. Allnut*, 2 S. & M. 216. See also 7 How. 502; 5 How. 581; 1 S. & M. 346.

The fourth ground we also rely on is tenable. Clark, the garnishee, is restrained by the service; he cannot pay what he owes to defendant in circuit court, and plaintiff there has taken no step against him.

For which several causes, we insist that the judgment of the circuit court be reversed, and that this court adjudge the said proceedings in attachment irregular and void, and the same be quashed; or that the cause be remanded with instructions, overrule plaintiff's demurrer, and that she be required to reply to the said pleas of defendant.

James v. Dowell.

Quitman and *McMurren*, for defendant in error.

1. According to the well-established rules of pleading, only one plea in abatement is allowable. The statute authorizing more than one plea to be filed, extends only to pleas to the merits.

2. After a party enters his appearance in an attachment suit, no motion or plea in abatement will be sustained to the regularity of the commencement of the attachment proceedings. The appearance of the defendant, under the statute on the subject, converts the proceeding *in rem* into a formal suit, and the party, by appearing voluntarily, waives all irregularity in the previous proceedings, and is limited to the merits of the controversy.

3. If the attachment has been commenced wrongfully, the defendant has his remedy by a suit on the bond given by the plaintiff in suing out the attachment; and if the plaintiff has made a false affidavit, he or she may be prosecuted for perjury.

4. But we contend that more than one attachment may issue against the same defendant's property. It being a proceeding *in rem*, against property, and not against the person, there is no reason or law that we are aware of, which prevents more than one proceeding of the kind at once. If an absent or absconding debtor has property in more counties than one, we know of no mode by which the same writ of attachment could be levied in both counties. A summons of garnishment might issue to different counties. In this case, the first attachment issued to Jefferson county, and it was found to be unavailable. A second issued to Adams, and has proved available. The first was dismissed, and the second relied on. We insist, then, that the commencement or pendency of the one is cause for abating the other. The defendant, after appearing, might possibly have them consolidated, or the court might put the plaintiff on his election which he would continue to prosecute, and order him to dismiss the other, where they were pending in the same court. But where the party has prosecuted but the one of them, the other one in suit cannot be pleaded in abatement of it.

As to the cause not having been disposed of by a judgment

for or against the garnishees, this matter has nothing to do with the regularity of the judgment against the defendant in the attachment. The judgment against him in strictness ought to be had before any judgment against the garnishees, or any dismissal as to them. If there shall hereafter be any error in the record regarding them, they are the parties to complain.

Mr. Justice THACHER delivered the opinion of the court.

This action was instituted by a writ of attachment. The writ was obtained against the property of the defendant below as a non-resident of this state, and by virtue of the statute H. & H. 550, sect. 16.

It is unnecessary to embrace in the affidavit, in cases of this kind, the actual place of residence of the defendant. The statute, in providing that notice should be given, contemplates that the actual place of residence may be unknown. H. & H. 552, sect. 20. The requisites are the allegations of non-residence and the impossibility of a service of the ordinary process of law. The motion to quash the attachment writ was therefore properly overruled.

Three pleas in abatement were filed to the action, to which a special demurrer was sustained. To the first ground of demurrer, it can be replied that in a case commenced by attachment, the defendant has a right to his plea in abatement when he appears and replevies the property attached. *Chambers v. Haley et al.* Peck's R. 159. The objection, that according to the settled rules of pleading, but one plea in abatement is allowable in the same action, is met sufficiently by the change in this respect instituted by our laws. The statute, H. & H. 597, sect. 43, declares that it shall be lawful for a defendant in any suit to plead as many pleas in bar of the action as he shall choose, although some of said pleas may be to the party, or to the character of the parties suing. The language of this act shows that pleas in abatement are thereby included. In the case of *Pharis v. Conner*, 3 S. & M. 91, this court has said that there is no objection, under our statute, to two different pleas in abatement, if there be two different causes of abatement.

James v. Dowell.

The first plea in abatement alleges that the defendant below was a citizen of the state of Mississippi, but does not allege that he had a residence in the county in which the action was instituted, and thereby show that the ordinary process of law could have been served upon him. This plea was therefore bad for uncertainty. The second and third pleas, however, contain different causes of abatement and are well pleaded in point of form. The court below, therefore, erred in sustaining the demurrer, which should have been overruled.

Judgment reversed, the demurrer directed to be overruled, and the cause remanded for further proceedings.

MALACHI PEQUES vs. JOSEPH MOSBY et al.

In an action on a note given for land, in which the defendant, under the plea of non assumpsit, offered proof to show that the plaintiff had not title to the land for which the notes were given, it is not competent for the plaintiff to show by parol, that there was a mistake in the description of the land in the title bond; and that the defendant was really put into possession of the land sold and had enjoyed it ever since; such proof may be made in a court of equity, but not of law.

Courts will construe covenants to be dependent, unless a contrary intention clearly appear; in an action, therefore, on a note given for land, to which the vendee received a bond for title, to be made when the purchase-money was paid, and that was payable in instalments, the right to enforce payment is not distinct and independent from the ability to make title; and the vendee may set up and show in bar of the action on the notes, a want of title in the vendor.

In error, from the circuit court of Marshall county; Hon. James M. Howrey, judge.

On the 10th August, 1842, William Peques sued Joseph Mosby and Robert G. Kyle upon two promissory notes, for \$1280 each, dated the 13th December, 1838, one due the first January, 1840, and the other first January, 1841; the defendants plead non assumpsit; a trial was had and verdict rendered for them. Several bills of exception were sealed during the progress of the trial. From the first, it appeared that the defendants read to the jury a title bond from Peques to them, conditioned to make title to the land therein, sold them on the payment of the purchase-money. The condition was in these words, after describing the notes: "Now if I shall make or cause to be made to the said Mosby & Kyle, a good and lawful deed of conveyance to the said half section of land, when the last note becomes due and is paid, then this obligation to be null and void; otherwise, to remain in full force and virtue of law, given from under my hand and seal, this 15th Dec. 1838."

The defendants then read various deeds, which it is not necessary to notice further than to say, that their object and effect were to show that the plaintiff had no title to the property sold by the title bond; but that the title was at the date of the bond, and then, in third persons. The defendants then proved by Gordentia Waite, clerk of the court of probates for Marshall county, who proved that there was no evidence on record in his office, of any title in the plaintiff, or claim on the part of the plaintiff, to the land described in the title-bond, or that he ever had title or claim thereto.

The plaintiff then offered to prove, by a witness, that the defendants had obtained the land they bargained for; that they took possession of it at the time of the contract, and had held peaceable possession ever since; and that, if the lands mentioned in the title-bond were not the same lands for which the defendants had contracted, the description in the title-bond had been erroneously stated by the draftsman of the bond through mistake and not through fraud, and that the witness was the draftsman of the bond; but the court refused to permit the evidence to be introduced, to which the plaintiff excepted.

The plaintiff asked for these instructions:

1. That under the contract proved by the title-bond, the defendants had no right to demand of the plaintiff the conveyance of the title to the land in the title-bond mentioned, until they have paid the notes mentioned therein.

2. That under said contract, the undertaking of the defendants to pay the plaintiff the money demanded in this action, and the undertaking of the plaintiff to convey to the defendants the land mentioned in the title-bond, are mutual and independent; and that not the performance of the plaintiff to make title to the defendants for said tract of land, but the promise itself constitutes the consideration of the defendant's notes, on which suit is founded.

3. Upon the question, whether the vendor of property at the time of the sale did disclose defects which he knew to exist, the question of proof is upon the party charging the fraud, to prove that the vendor did not disclose such defects; for fraud is never to be presumed, but must always be proved.

Peques v. Mosby et al.

4. The contract to pay the three promissory notes, is entirely independent of the covenant for title, and by the terms of the agreement, defendants could not demand a performance of the covenant to convey, without showing a payment of the whole three notes, or an offer to pay them.

These instructions were all refused; and in lieu of the first and second, the court below gave the following: "It is a general rule of law in this state, that under such contracts as that proven by the title-bond in this case, the defendants have no right to demand of the plaintiff the conveyance of the title to the land in said bond mentioned, until they have paid the notes mentioned in the bond. But if the plaintiff has no title or shadow of title at the time he contracts, and still has none, the defendants may set up the defence in a suit at law on the notes, and is not bound to wait until a recovery and payment of the purchase-money. In lieu of the third charge asked, the court instructed the jury, that fraud could not be inferred, but might be proved either directly or by circumstances.

At the instance of the defendant, the court further instructed the jury:

1. If, from the proof in this case, the jury should believe that at the time of the contract for the sale of the land, Peques had not title, and still had not title to the same, but sold the land of another without color or semblance of title, the defendants could, in a suit at law, resist the payment of the purchase-money on that ground.

2. When a person takes upon himself to contract for the sale of an estate in land, and is not the owner of it, nor has it in his power by the ordinary course of law or equity to make himself so, neither law or equity will enforce the buyer to take; for no man was permitted to speculate on another's estate.

3. The contract to be valid must be mutual; that is, Peques, at the time of the sale, must have had such claim or title to the land, as by the aid of a court of law or equity, he could place himself in a situation, specifically, to perform his contract by making to the purchaser a clear and indefeasible title to the land described in the agreement or contract.

The plaintiff moved for a new trial, which being refused, he sued out this writ of error.

Lucas, Watson, and Clapp, for plaintiffs in error.

1. The first question to be considered, arises upon the exclusion of the testimony of the witness Wall. It was surely competent to prove, that the defendants had the land they had bargained for. 1 Leigh R. 483. Had the plaintiff in error shown that the defendants in error had held and enjoyed the land sold them without interruption, they could not have defended themselves against the payment of the purchase-money. *Anderson v. Lincoln*, 5 How. R. 279; *Coleman v. Rowe*, 5 Ibid. 460.

2. The three instructions given by the court, on the motion of the counsel for the defendant in error, invaded the province of the jury, in assuming a fact, without proof of which, in no possible aspect of the case can either one of said instructions be correct. It was for the jury to determine, whether or not the land, in the title-bond mentioned, was the consideration for which the notes sued on were given; and no instruction of the court should have proceeded on an assumption of this fact, as the instructions given did. Each one of these instructions should have been so framed, as to show to the jury, that unless they believed from the evidence in the cause that the land, in the title-bond mentioned, was the consideration for which the notes sued on were given, they were to regard the said instructions as having no application whatever to the case. All that was necessary for this purpose, was, that the defendants, by their counsel, should have stated their case hypothetically in the instructions asked. This, however, was not done, and for this reason, if for no other, said instructions were erroneous. 1 Rob. Prac. 340, 341; *McRea v. Scott & Saunders*, 4 Rand. 463, 465; *Smith et al. v. Carrington et al.* 4 Cranch, 62; *Dickson v. Moody*, 2 S. & M. 15. It does appear, from another part of the record, that the land was the consideration of the notes, but it has been repeatedly decided that facts, on testimony stated in *one* bill of exceptions, cannot be noticed by an appel-

late court, in considering *another*. *Brook v. Young*, 3 Rand. 106; 2 Leigh, 639. Unless, indeed, there is a reference from one bill of exceptions to the other; but, in the present case, no such reference exists. 5 How. 606. From the correspondence in date, amount, &c. between the notes declared on, and the notes mentioned in the title bond, it may be inferred that the land mentioned in the title bond was the consideration for the notes; but of the weight, sufficiency and effect of this circumstantial testimony, the jury should have been left the exclusive judges. Authorities cited above.

3. The covenants or promises in this case, are not dependents but independents. "It is well settled in reference to the question of the dependence or independence of covenants, that where a day is appointed for payment by the defendant, and such day is to happen before the thing which was the consideration of the defendant's contract was to be performed, an action may be brought for the money, for it appears that the defendant relied on his remedy." Opinion of the court in *Leftwich et al. v. Coleman*, 3 How. R. 167; *Rector v. Price*, Ib. 321. See also *Hogeman v. Sharkey*, 1 Ib. 277; *Gibson v. Newman*, Ib. 341; 1 Saund. R. 320, (a.) The undertaking of the defendant in error is absolute and positive, that they will pay the appellant \$3840, in three equal annual instalments, and in consideration of the payments being made at the times, and in the manner specified, the appellant, plaintiff in error, bound himself to convey in fee simple the tract of land in the title bond mentioned. The payments were to be made without reference to the conveyance, and the conveyance was not to be executed until all the payments were made. The language of the title bond is, "That the appellant is to make to the defendants in error title to the land in question, when the last note becomes due and is paid." It is impossible for language to make covenants or promises more independent than these. *Granby v. Cheevers*, 9 Johns. R. 126; *Robb v. Montgomery*, 20 Ib. 15. In the case of dependent covenants, the conveyance and payments are to be simultaneous acts, and then there must be an existing capacity in the one who is to convey a good title: in

the other case, where the payments are to precede the conveyance, it is no excuse for non-payment, that there is not a present existing capacity to convey a good title, unless the one whose duty it is to pay, offers to do so, on receiving a good title, and then it must be made to him, or the other party will be in default. The defendants in error never offered to pay, and never demanded a conveyance; and therefore it furnishes no bar to plaintiff in error's suit, that at a certain period plaintiff in error had not the title. He might have had it, and would have had it, had the defendants in error paid the money, and demanded a deed.

4. If the positions above assumed be true, it follows that the verdict of the jury was contrary to law and evidence, and the motion for a new trial should have been sustained.

Yerger and Scott, for defendants in error.

A court of law was not the place to correct any mistake, if any such was made. The evidence was properly ruled out.

It is not, however, pretended that it was not the land sold. The witness says hypothetically, that if it was not the same land, &c. &c.

The court also, according to many decisions, and some made by this court, was right in ruling out the evidence of possession, because if the circumstances show fraud, express or implied, eviction is not necessary.

The plaintiff does not pretend that he has any claim to the land; he sets up none. It is proved clearly that the land mentioned in the bond belonged to other persons. He does not even exhibit a deed, or agreement, written or verbal. It was a sale of land belonging to another, which he must assuredly have known did not belong to him. This he was obliged to know, for he has no pretence of title.

Judge Story says, (1 Com. on Eq. 218) "If a vendor sells an estate, *knowing* that he had no title, of which the vendee is ignorant, the concealment of such a material fact would clearly avoid the sale on the ground of fraud."

Here is a man selling lands which the records show without

Peques v. Mosby et al.

dispute belong to another. He must have known he had no title; it was a legal fraud.

But this court has decided, that where a note is given for a lot, and that the consideration had wholly failed for want of title in the vendor, it is a good defence. *Ray v. Woodfolk*, 1 S. & M. 523. So in *Brewer v. Harris*, 2 Ib. 84; *Kilpatrick v. Dye's heirs*, 4 Ib. 289.

The question whether the covenants were dependent or independent, does not arise, for where there is fraud or a total failure of consideration, the foregoing cases recognize the right to defend on that ground.

Mr. Justice CLAYTON delivered the opinion of the court.

Peques sold a tract of land to the defendants, and gave a bond to make title, when the purchase-money should be paid. Suit was brought upon two of the notes executed for the purchase-money, and the plea of *non assumpsit* filed. On the trial the defendants offered proof to show that the plaintiff never had title to the land mentioned in the title-bond. The plaintiff then offered to prove, by parol, that there was a mistake in the description of the land contained in the title bond, and that the defendants were placed in possession of the land really sold, which they had ever since enjoyed without disturbance, and that the notes were executed for that land.

This evidence was objected to, and excluded by the court. To this, exceptions were filed. Several instructions were asked on the part of the plaintiff, which were refused by the court, and a verdict was rendered for defendants. A writ of error thence brings the case to this court.

Parol evidence to show that a mistake exists in a deed or written instrument, and to correct that mistake, is not admissible in a court of law. Upon a bill filed in chancery to correct the mistake, and to reform the deed, such evidence may be received, since it is one of the acknowledged heads of equity jurisdiction to correct mistakes. *Marquis of Townsend v. Star-groom*, 6 Ves.; *Clowes v. Higginson*, 1 Ves. & Bea.; *Gris. on Eq. Ev.* 205; 2 Hum. 72; 1 Greenl. on Ev. 358, § 296; 1 Story

Peques v. Mosby et al.

Eq. 164, 175; *Ratcliffe v. Alison*, 3 Ran. 537; *Hunt v. Rousmanier*, 1 Peters, 1; 3 Phil. Ev. 1429 — 1434; 6 N. H. 205. The instructions asked for and refused, assert the proposition that the right to enforce payment is distinct and independent from the ability to make title, and hence the want of title cannot be used as a defence. These charges were properly withheld. Courts will construe covenants to be dependent, unless a contrary intention clearly appears. *Gardner v. King*, 2 Iredell; *Stockton v. George*, 7 How. 175. A party is not thus forced to pay out his money, unless he can get that for which he stipulated. In this instance the party must seek his relief in equity.

Judgment affirmed.

WILLIAM P. LEGGETT vs. WILLIAM SIMMONS.

The rule of the liability of the master for the act of his slave, seems to be limited to cases in the way of trade, or public employment, or where any injury is occasioned to another by any act done by a slave, in pursuance of his master's directions, but not for proceedings of a slave unauthorized by the master.

The liability of a master, in a civil action, for the felonious killing by his slave of the slave of another, seems to depend upon the criminal knowledge or agency of that master in the transaction.

The authorization from a master to his slave to do an act, or the agency of a master in the transaction of his slave, may be gathered from the circumstances surrounding the occurrence.

S. sued L. in an action of trespass, to recover the value of a slave, supposed to have been killed by the slave of L., and proved that his slave visited the plantation of L., and upon his own, the slave's, request, twice received from L. a dram of spirits, in company with a slave belonging to L., who is supposed to have taken the life of S.'s slave; that during the night L. was aroused from sleep by a clamor among his slaves, which was found to proceed from the two slaves to whom he had given the drams; and that as L. approached them, armed with a gun, the slave of S. rushed upon him and discharged his gun; after which L. took no steps to drive S.'s slave away, but permitted him to remain upon his premises; that L. in a short time was again aroused by a similar clamor, and approaching the spot he beheld first the two slaves in a struggle together, and next the slave of S. pursuing and threatening the life of his, L.'s slave, and thereupon, as the difficulty seemed to cease, L. left the spot and returned into his house; and the next morning the slave of S. was found dead upon the spot where the last quarrel took place: *Held*, that the facts do not amount to sufficient proof that L. commanded or authorized his slave to take the life of the slave of S. and that S. could not therefore recover.

ERROR, from the circuit court of Pike county; Hon. Van Tromp Crawford, judge.

William Simmons sued William P. Leggett, to the October term, 1843, of the circuit court of Pike county, in an action of

trespass, to recover the value of a negro man, named Solomon, the property of the plaintiff, alleged to have been killed by a negro man, named Moses, the property of the defendant. The declaration avers, that "the defendant, with force and arms upon the body and person of Solomon, a negro man-slave, the property of the said plaintiff, of great value, to wit, of the value of one thousand dollars, did commit, and cause to be committed, an assault, and him the said Solomon, slave of said plaintiff, as aforesaid, with a certain pocket-knife, did then and there stab, cut and wound, and cause to be stabbed, cut and wounded, whereby, and of which stabbing, cutting, and wounding by the said defendant, then and there done, and caused to be done, as aforesaid, the said negro slave Solomon, then and there instantly died, and was thereby wholly lost to the said plaintiff," &c. The defendant pleaded the general issue. Afterwards the declaration, by leave of the court, was amended, and two more counts added; the one charging that the slave Solomon was killed by a slave named Moses, the property of the defendant, "by and with the advice, assistance, promotion, and consent of the defendant," and the other averring that Solomon was killed by Moses, without averring that it was done either by the command of the defendant, or with his knowledge or assent. The jury found a verdict for the plaintiff for eleven hundred and eighty dollars. The defendant entered a motion for a new trial, on the following grounds, to wit:

"1. Because the court charged the jury that they were authorized, in such cases, to give a verdict for 'smart money.'

"2. Because the verdict in said cause was unsupported by, and plainly contrary to, law and evidence.

"3. Because the damages allowed were excessive.

"4. Because said verdict was directly contrary to the charge of the court, as requested by defendant's attorney."

At the same time the plaintiff remitted one hundred and eighty dollars of the damages assessed by the jury. The court overruled the motion for a new trial, to which the defendant filed a bill of exceptions, and set out the evidence, in substance as follows, to wit: On the trial the plaintiff proved that the defendant

confessed or stated as a witness on the coroner's inquest, and before the committing magistrate, that on Saturday evening, about dark, the 3d day of June, 1843, the slave Solomon came to his house and asked him for a drink of spirits; that he directed a dram to be given to Solomon, and also to his own boys; and afterwards another dram was given to them, and Solomon then went to his, defendant's, negro-house; that some time afterwards he was aroused by a fuss in the negro-house, where the negroes were gambling; that he went out with his gun to stop it, and as soon as Solomon saw him, he, Solomon, rushed upon defendant, seized the gun, and fired it off in defendant's hands, and then ran off; but after awhile peace was restored, and Solomon was permitted to return; that defendant then returned to bed, and in a short time was again aroused by another fuss in the house of Moses; defendant again went out to see about it, and when he arrived at the door of Moses's house he saw Moses and Solomon coming out of the house, engaged in a struggle; that Moses broke loose from Solomon, and ran round an oak tree in the yard, Solomon pursuing him, striking at him with a knife, and swearing he would kill Moses, if he was the last negro in the world. In that manner they ran round the tree several times, when suddenly the fuss ceased, and the defendant again returned to his bed; after which he knew nothing more about the matter until next morning, when he found Solomon dead, with a knife lying by his hands. The witnesses said they did not hear the defendant say that Moses killed Solomon, or that he, defendant, advised, assisted, promoted, or assented to the killing. Witnesses understood defendant to say his object was to make peace; but he did not say he commanded peace, or used any means to make peace. The defendant also stated before the coroner's inquest, that Solomon was a bad negro, and he had previously ordered him not to come to his house. The plaintiff then proved that Solomon was worth about one thousand dollars at the time he was killed. No other evidence being offered the plaintiff asked the court to instruct the jury, that "if they believe from the testimony of the acknowledgments of the defendant, that he was present, and an eye-witness of the killing

of Solomon, the slave of Simmons, by Moses, the slave of defendant, and did not forbid the act, nor take any measures by a command to his slave, or otherwise, to prevent it, such presence and silence is *prima facie* evidence to support this action." Which instruction was given by the court, and the defendant excepted, and now prosecutes this writ of error.

J. M. Smiley, for plaintiff in error.

The court below erred in not granting a new trial, because the verdict of the jury was contrary to law and evidence.

The master is not liable for a trespass committed by his slave unless done by his command. Saunders on Pleading and Evidence, 863.

The testimony in this case shows that the object of Leggett, the defendant below, was to make peace, not to promote or encourage the commission of a trespass or felony.

The testimony leaves it in great doubt whether the slave Moses killed Solomon at all. And if he did the evidence makes it a clear case of justifiable homicide. How. & Hutch. 694, sect. 3.

The record in this case shows that the verdict of the jury is contrary to law and evidence, as clearly as any that could well be imagined. And the rather arbitrary rule, established in the eleventh judicial district, to refuse all motions for new trials alone, makes it necessary to appeal to this court.

William Vannerson, for defendant in error.

We rely, for sustaining the judgment in favor of defendant in error, upon the following principles, and these authorities, so far as regards the amount of the judgment.

In trespass *vi et armis* there is no precise rule of damages. Damages, in the discretion of the jury, are not limited to the value of the property injured or destroyed. The action is in its nature vindictive; and when the jury give exemplary damages, the court ought not to interfere unless they are manifestly outrageous. *Dennison v. Hyde*, 6 Con. R. 509, 520; 8 Am. Com. Law, 202; *Allen et als. v. Administrators of Gray*, 1 Greenl. 294.

But the remitter, entered by the plaintiff below, we think, leaves the question of damages out of the question in this court, inasmuch as the value of the negro killed, as assessed by the jury, is amply sustained by the testimony, except the amount remitted.

For sustaining the action, under the circumstances of this case, we rely upon the following general principles and authorities :

All persons assisting in the commission of a trespass are principals and trespassers. 1 Chitty's Pl. 63.

A person is liable as a trespasser for advising to the act. 8 Am. Com. Law, and authorities there cited, 180, 190.

It is not material whether the conduct of Leggett's slave was under the direction or sanction of the master or not, or whether the master's direction or sanction thereof is tested by his express command, or by his being present at the doing of the act, and not forbidding it, or by other circumstances, evincing his approbation, is equally immaterial. He is, in either case, liable; for the law is, that if one agree to a trespass that has been committed for his benefit, this action lies against him, although it was not done in obedience to his command, or at his request. The same if he advise it, though not present. 6 Littell's R. 118; Bac. Ab. tit. Trespass, letter G, 589, 590; *Crawford v. Cheney*, 15 Louisiana R. 142; 5 Hammond's Ohio R. 351; 3 Monroe's Ky. R. 423; Am. Com. Law, before cited, 180-190; Wheeler's Law of Slavery, 235, 236.

Upon the principle of the case, and upon the authorities cited, we rely for the affirmance of the judgment below.

W. P. Harris, on the same side.

It is not necessary, for our purpose, to combat the proposition laid down by the counsel for the plaintiff, that the master is not responsible for the act of his servant, unless such act is done by the command of the master. A true exposition of this rule shows that it is not an obstacle to a recovery. The command need not be express. Assent to the act of the servant is sufficient, and this assent may be implied from circumstances. Nor

is this assent necessary, where there rests upon the master a legal obligation or duty in regard to the conduct of the servant in relation to third persons. Story on Agency, 469-471; *Caldwell v. Sacra*, 6 Littell, 118. When the relation between the master and servant is such, that the master can control the conduct of his servant, and it is his duty to exert this control, he will be responsible for failing to exert it. See the opinion of Chief Justice Eyre, in *Bush v. Steinman*, 1 Bosan. & Pull. 409. The particular language to which I refer is as follows: If any man, having control over the actions of another, by the absence of due care and control, negligently suffer him to commit an injury, he shall be responsible, &c. This is but the sense of the familiar maxim, *qui non prohibet quum prohibere posset juvat*.

If the law applicable to the relation of master and servant at common law, governs the relation of master and slave, as it exists in this country, the reason of the doctrine cited before would require an enlargement of the responsibility of the master in proportion to the extension of the master's power over the slave, and the increase of his duty and obligations consequent upon that power. The institution of slavery gives to the master, with some restrictions, which do not affect the principle contended for, almost absolute control over the actions and conduct of his slave. And in consideration of this control it exacts from him such an exercise of it as will protect the rights of third parties. It is true that the slave is criminally responsible for his acts; but this provision of the criminal code results from public policy, and was not intended to abridge the civil responsibility of the master.

The question as to whether or not an indictment for murder would be sustained against the slave Moses, or whether or not the circumstances amount to a justification, cannot be considered under the state of the pleadings. The intention with which the act is done is not the criterion in actions of this kind. 1 Bing. 213; 2 H. Bl. R. 832.

Upon the whole case, as disclosed by the testimony, and the view taken of the law of the case, the verdict was right, or at

least the jury might fairly interpret the conduct of Leggett as imposing upon him a responsibility for the loss of the slave Solomon.

Mr. Justice THACHER delivered the opinion of the court.

This is an action of trespass to recover damages for the loss of the plaintiff's slave by the act of the defendant's slave.

A bill of exceptions, filed upon the overruling of a motion for a new trial, discloses the substance of the whole evidence. The facts are briefly,—that the deceased slave visited the plantation of the defendant, and, upon his own request, twice received a dram of spirits from the defendant, in company with the slave of the defendant, who is supposed to have taken his life; that some time after, the defendant was aroused from sleep by a clamor among his slaves, which was found to proceed from the two slaves in question; that as the defendant, armed with a gun, approached those slaves, he was run in upon by the plaintiff's slave, who discharged his gun; that the defendant took no steps upon this act, but seems to have allowed the plaintiff's slave to still remain upon his premises; that not long after, the defendant was again aroused by a similar clamor, and approaching the spot, he beheld first the two slaves in a struggle together, and next the slave, now deceased, pursuing and threatening the life of the defendant's slave, and thereupon, as the difficulty seemed to cease, the defendant left the spot and returned into his house; and that, upon the following morning, the plaintiff's slave was found dead upon the spot where the last quarrel took place. Evidence was likewise adduced to show that the deceased slave was of \$1000 value. The jury found a verdict for the plaintiff below, in \$1180, of which amount the plaintiff remitted \$180.

The rule of the liability of the master for the act of his slave, seems to be limited to cases in the way of trade, or public employment, or where any injury is occasioned to another by any act done by a slave in pursuance of his master's directions, but not for proceedings of a slave unauthorized by the master. *Shoe v. Trice*, 2 Bay, 345; *Saunders on Plead. and Ev.* 863.

Leggett v. Simmons.

The liability of a master in a civil action for the felonious killing by his slave of the slave of another, seems to depend upon the criminal knowledge or agency of that master in the transaction. *Wright v. Weatherby*, 7 Yerg. 367. It is true that an authorization from a master to his slave to do an act, or the agency of a master in a transaction of his slave, may be gathered from the circumstances surrounding the occurrence. But the facts of this case, as detailed in the record, do not amount to sufficient proof that the defendant below commanded or authorized his slave to take the life of the deceased slave. At most, these facts show a case of manslaughter by defendant's slave — a killing during a sudden quarrel, and at least, a case of justifiable homicide. In the first point of view, although a master might be sufficiently culpable in his agency in a matter of manslaughter by his slave as to expose him to damages in a civil action, yet the features of the evidence in the present case do not seem to carry such an impression, and in the latter point of view, the defendant would be clearly exonerated. The defendant was doubtless censurable and blamable, for want of care, prudence, and resolute and sufficient interference between the slaves at the outset of the fatal difficulty, but his conduct seems hardly to warrant the finding of the jury, as such cases are contemplated by the law.

Judgment reversed, and a new trial directed to be allowed.

**DYER PEARL vs. WILLIAM E. CONLEY and FRANCIS E. WILLIS,
Administrators of William T. Willis, deceased.**

The statute makes it the duty of executors and administrators to cause publication to be made for the presentation of claims against the estates which they represent, to be commenced within two months after the granting of letters testamentary, &c.; the same statute also provides that all claims against the estates of decedents shall be presented to the executor, &c. within eighteen months after the publication of notice, for that purpose, by such executor, &c. The notice thus designed to be given is purely constructive, and the provisions of the law must be strictly pursued by executors, &c.; in order therefore to bar the claims of creditors of an estate because they had not been presented within eighteen months from the publication of the grant of letters, the executor or administrator must show affirmatively, that the publication was commenced within two months after the granting of letters testamentary, &c.

The creditors of an estate are not bound to take notice of any publication made by executors and administrators, requiring the presentation of claims within eighteen months, &c. commenced after the expiration of two months from the date of the grant of letters.

ERROR from the circuit court of Yalabusha county; Hon. Hendley S. Bennett, judge.

Dyer Pearl sued William E. Conley and Francis E. Willis, as administrators of William T. Willis, in the circuit court of Yalabusha county, to the November term, 1842, in an action of assumpsit. The declaration was founded on a bill of exchange for twenty-five hundred dollars, drawn by William T. Willis in his lifetime, and was in the usual form. The defendants pleaded the general issue. On the trial, after plaintiff closed his evidence, the defendants proved that letters of administration on the estate of William T. Willis, deceased, were granted to them by the probate court of Yalabusha county, on the 7th day of October, 1840, and they were duly qualified as administrators on the same day; and that they

Pearl v. Conley et al.

gave notice, by publication in the "Southern Reporter," a newspaper published in the town of Grenada, in Yalabusha county, to all creditors of said estate to present their claims for payment within the time prescribed by law, or they would be barred by the statute of limitation. The publication of which notice they proved was commenced on the 12th day of December, 1840, and continued for six weeks successively. The evidence being closed, the plaintiff's counsel asked the court to instruct the jury "that they must believe, from the testimony, that due publication for the presentation of claims against the estate of William T. Willis, deceased, was commenced by the administrators within two months after the granting of letters of administration on said estate, by the probate court, or the defendants were precluded from setting up the statutory bar of eighteen months, for want of the presentation of the claim against said estate within the time prescribed by law." Which instruction the court refused to give, and charged the jury "that if they believed that publication had been made for six successive weeks, and the plaintiff's claim had not been presented within eighteen months after the last publication, although publication did not commence within two months after the grant of letters of administration, that the publication was sufficient notice to bar the plaintiff's action;" to all of which the plaintiff excepted. The jury returned a verdict in favor of the defendants, and judgment was entered accordingly; to reverse which, the plaintiff now prosecutes this writ of error.

A. C. Leigh, for plaintiff in error.

Under the old common law rule of pleading, the administrator, in order to take advantage of the statutory bar, was compelled to plead it "with all the particularity required by the statute." But our statute allows him to give those matters which constitute the bar, in evidence under the general issue. This statute then, has only modified the strictness of the old common law rule of *pleading*, but leaves the rules of *evidence* untouched. In other words, you can introduce under the gen-

eral issue that evidence which formerly was only introduceable under a special plea. We have a sure index to the character of evidence required under a special plea, when we have found out what averments are material in such a plea. In the case of *Wren's Adm'r. v. Spon's Adm'r.* 1 Howard, 115, the court, in delivering an opinion upon this subject, say, "The plea will be defective unless it sets forth the date of letters testamentary, or administration, that there was publication within *two months after such date*, and that such publication was continued for six weeks successively." In the case now before the court, the letters are dated on the 7th of October, and the first publication is made on the 12th of December following. Now does this proof substantiate what the court has decided to be a material averment? In other words, is the averment that publication was made within two months, supported by proof that it was not made in two months?

If the administrator is allowed six days over two months to commence his publication, (as is the case in the present instance,) would not the same rule of construction allow him as many years? We submit that the court has no discretion in the matter, that it cannot enlarge the time created by legislative enactment. By reference to How. & Hutch. 414, it will be seen that the statute is positive upon the subject. "It shall be the duty of executors, &c. within two months after the granting of letters," &c. The statute of eighteen months limitation, is for the benefit of estates, by facilitating the administrator in coming to a final settlement. And that statute commences running at what time? "When the term of publication is complete and ended." See *Helm v. Smith's Ex'r.* 2 S. & M. 427. So that it seems that the statute is not an absolute bar. Something must be done by the administrator before it will attach; and it is incumbent upon him, before he can take advantage of it, to show that he has complied with the requisitions of the law. In other words, he must make a publication according to law. But the publication, in the present case, was not according to law. The administrator has no authority to make a publication of notice, except wherein he is authorized by statute to do

Pearl v. Conley et al.

it, and he is bound then strictly to pursue that authority. "The acts of administrators are only legal so far as they are in pursuance of law." See 1 How. 559.

E. S. Fisher, for defendants in error.

The record, in this case, presents but one error, and that is, that the court below erred in the instructions to the jury, that if they believed, from the testimony, that publication was made for six weeks successively, in the paper produced in court, although not commenced within two months after the grant of letters of administration, and that if the plaintiff's claim was not presented in eighteen months after the last publication, they must find for the defendants. I insist that this instruction is correct, and conforms in all respects to the statute.

The counsel for the plaintiff insists that publication cannot be made by an administrator or executor, after the expiration of two months from the grant of letters. This position is not sustained by the statute. It is true the statute requires publication to be made in two months after letters granted; but for whose benefit was this law enacted? We answer for legatees and distributees, and not for creditors. The demands of creditors must be satisfied before the legatee or distributee can assert his claim to the estate of the deceased. This statute was therefore enacted to require creditors to exercise diligence in presenting their claims in a specified time, that the heir or legatee might ascertain his interest in the estate, and reduce it into possession by a certain period. A failure to make this publication within two months, is no injury to the creditor, but on the contrary, a benefit to him; certainly he cannot be heard to complain of that which was a benefit to him. The statute having been enacted to protect the interest of persons occupying the characters of legatees or distributees, they are the only persons who can complain of its infraction. If they have sustained any injury by the failure of the administrators, to act with that promptness required by law, they can assert their remedy, when it shall please them to do so, for whatever damages they may have sustained.

g
at
tha
hing
nd it
it, to
law.
law.
ing to
blice
to do

The law is positive that claims not presented in eighteen months after publication shall be barred. See H. & H. 413, § 92. The case referred to in 1 Howard, was a mere intimation of the court, as to the pleadings in that case, and was not a decision upon a state of facts, like the present case.

William Thompson, in reply.

The sole question in this case, is, whether the administrator, in order to bar claims not presented in eighteen months from time of notice for their exhibition, should make it appear that he commenced the publication of such notice within two months after the granting letters of administration.

I rely much upon the brief made by A. C. Leigh in this cause, in behalf of the plaintiff in error, for whom I also appear.

The act was intended, to some extent, for the convenience, aid, and safety of executors and administrators; and the publication of the notice within two months after the granting letters of administration, &c. is a condition precedent to their getting the advantage of it. If they can depart from the provisions of the statute, and make the publication six days after the two months had expired, from the time of granting the letters, what would hinder them from doing it six years after?

But what, it may be asked, if the estate of the decedent should be prejudiced by the neglect of the executor or administrator?

If the estate should be prejudiced by the neglect of the executor or administrator to do his duty, the heir or distributee could hold him responsible.

The better collocation of the words, to get at the meaning of the legislature, would be, "It shall be the duty of executors, &c. within two months after the granting of letters, &c. to publish," &c.; and "all claims, &c. shall be presented, &c. within eighteen months after the publication by notice, &c."

The section of the statute on this subject is to be taken entire, and is as imperative in the one requisition as in the other, and neither can be dispensed with.

Suppose the administrator had given notice in some other way than by publishing for six weeks consecutively in the newspaper, would it answer? Even if it promised much more effectually to give notice to creditors, would it answer? It will not be contended it would.

The failure of the executor or administrator to advertise in the two months after the granting the letters, does not relieve him from being compelled to settle up and distribute the estate in the time prescribed by law. He would have to depend on a refunding bond by the distributees, instead of a bar of the claims after eighteen months.

The statute must often work injustice to creditors; and all its requisitions should be strictly complied with, to create the bar.

Mr. Justice THACHER delivered the opinion of the court.

This is an action by the creditor of an estate against its representatives, and the statute of limitations, enacted concerning the presentation of claims against the estates of decedents, was relied upon as the defence. This defence involved the question, whether an administrator, in order to bar claims not presented in eighteen months from the time of notice for their presentation, should show that the commencement of the publication of such notice was made within two months after the grant of letters of administration to him.

The statute makes it the duty of executors and administrators to cause publication for the presentation of claims against the estates which they represent, to be commenced "within two months after the granting of letters testamentary," &c. The same statute also provides that all claims against the estates of decedents shall be presented to the executor, &c. within eighteen months "after the publication of notice for that purpose by such executor," &c. H. & H. 413, sect. 92. The notice thus designed to be given is purely constructive. The creditor of an estate is not bound to take notice of any such publication commenced after the expiration of two months from the date of the

Pearl v. Conley et al.

grant of letters, and surely could not be bound by a notice commenced at any indefinite period, more than two months after the grant of letters. The provisions of the law in this respect must be strictly pursued by executors, &c., and must be made so to appear, in order to bar the claims of creditors of an estate.

Judgment reversed, and new trial granted.

DOE ex dem. HIT-TUK-HO-MI et al. vs. JARED WATTS et al.

Coleman v. Tish-ho-mah, 4 S. & M. 40; and *Newman v. Harris*, 4 How. 560, cited and confirmed.

A patent may be impeached for illegality or fraud, and declared void in a court of law, as well as in a court of chancery.

A patent which issues from the general government to land, which has been previously appropriated by the government and reserved from entry, is void.

An Indian, claiming under the 14th article of the treaty of Dancing Rabbit Creek, who has brought himself within the provisions of that article of the treaty, is clothed with a perfectly legal title, which will prevail against a patent subsequently issued by the general government to the reservation of such Indian.

In error from the circuit court of Jasper county; Hon. Stephen Adams, judge.

John Doe, on the demise of Hit-tuk-ho-mi, and of John Johnston, jr. sued Jared Watts, Isaac Garey and Alfred Brown, in ejectment. On the trial, Allan Yates, on behalf of the plaintiff, testified that Col. William Ward was the agent of the government of the United States, charged with the execution of the treaty of Dancing Rabbit Creek; that he was present in June or July, 1831, at Ward's agency, to have the claims of his children to land allowed; when Ward informed the Indians there, that all who wished to stay and become citizens had the right to do so, and that he was there ready to register their applications; and had a book or register open for that purpose; when a number had their names registered. Capt. Red-post-oak was at the agency at the time, and approached Col. Ward, holding a large bundle of sticks in his hand, about six or eight inches long, and informed the agent, that he had come to register for himself and people, to stay and become citizens under the treaty, and that the sticks represented the heads of

the families and the number and ages of their children; but Col. Ward refused to receive them, on the ground that they were too many; at which Capt. Red-post-oak turned angrily off. That subsequently the witness was at the agency, and found the register of Indian names mutilated, and in part destroyed; the registry of his own children and others that he had registered being among those torn out; that Col. Ward told him that one Daniel Folsum, had during his absence entered the agency, and torn out the names of a great many Indians, in order to force them to emigrate west, in order to his own election as a chief among them.

Chish-a-ho-mah, alias Capt. Red-post-oak, testified that at the date of the treaty of Dancing Rabbit Creek, Hit-tuk-ho-mi was a Choctaw, head of a family, and had an improvement on the land on which he resided at the time, and continued to live on it for about eight years, until he was dispossessed by a white man; that within six months from the ratification of the treaty, Hit-tuk-ho-mi employed him as his agent to notify Col. Ward that he wished to remain and become a citizen of the state, and receive his benefit of the 14th article of the treaty; that he did so notify Ward; the witness was the agent for all his tribe, and Ward requested witness to give him their names; they were so numerous, Ward refused to register them all, and told witness it should all be right; he is positive he gave Col. Ward the name of Hit-tuk-ho-mi, with the request that it should be registered, as he was his near neighbor and a man of standing and influence. On a second visit, Ward positively refused to register the names of those he was agent for.

The residence and application of Hit-tuk-ho-mi, and his continuance on the land in controversy, until dispossessed about four years prior to the suit by a white man, were proved by several other witnesses; the evidence of the defendant, upon the land in controversy was also proved. The plaintiff then read a deed from Hit-tuk-ho-mi and wife to John Johnston, sen. to the land, and closed their case.

The defendants introduced evidence to impeach the character for veracity of Capt. Red-post-oak, and introduced also the

patents from the general government, dated in 1842, predicated on certificates of entry, in 1833, of the land in controversy, which was all the evidence before the jury. -

The plaintiff asked the court to instruct the jury, that if they believed from the evidence, that Hit-tuk-ho-mi was a Choctaw Indian, the head of a family at the date of the treaty, and within six months thereafter, notified the United States agent, by agent or otherwise, of his intention to become a citizen, and resided on the land for five years, next ensuing, his title was complete. This instruction as asked, the court refused to give; but gave other instructions asked for by the plaintiff, which it is not deemed necessary to notice.

Nine charges were asked and given by the court for the defendant; of which it will be requisite to note only the following, viz. :

1. That a patent is the highest evidence of title; it is evidence that all the prerequisites have been complied with and cannot be questioned either in a court of law or equity, unless it be on the ground of fraud or mistake.

2. That before any title can be gained by a second patentee, the first patent must be impeached and set aside, which can only be done in a court of equity.

3. That priority of date of patent is the best evidence of title, although the opposite party made the first entry.

The jury found for the defendants; and the plaintiff below prosecutes this writ of error.

Mr. Justice CLAYTON delivered the opinion of the court.

This case arose under the 14th article of the Dancing Rabbit treaty, and bears a strong resemblance to cases heretofore decided by this court. *Coleman v. Doe, ex dem. Tish-ho-mah*, 4 S. & M. 40; *Newman v. Harris & Plummer*, 4 How. 560. A verdict and judgment were rendered for the defendants, and the case brought by writ of error to this court. Several charges were given by the court to the jury, at the instance of the defendants; these form the basis of the errors assigned in this court. Only part of these charges need be noticed.

The first is, that a patent is the highest evidence of title; it is evidence that all the prerequisites have been complied with, and cannot be questioned, either in a court of law or equity, unless it be on the ground of fraud or mistake.

2. That before any title can be gained by a second patentee, the first patent must be impeached or set aside, and this can only be done in a court of equity.

3. That priority of date of patent is the best evidence of title, although the opposite party made the first entry.

These instructions are opposed to the principles laid down in the cases above referred to, as well as to cases in the supreme court of the United States.

In *Stoddard v. Chambers*, 2 How. S. C. Rep. 317, the court say, "On these facts the important question arises, whether the defendant's title is not void. This question is as well examinable at law as in chancery. . . . The patent of the defendant having been for land reserved from such appropriation, is *void*." Again, in *Grignon's Lessee v. Astor*, Ib. 344, the court say, "the title became a legal one by its confirmation by act of congress, which was equivalent to a patent. It was a higher evidence of title, as it was a direct grant of the fee, which had been in the United States, by the government itself, whereas the patent was only the act of the ministerial officers." These cases clearly show that these charges were erroneous; and show the correctness of the principles heretofore asserted in this court.

Most of the other instructions relate to the registration of the Indian, and his residence upon the land. The law upon these points has been settled in this court by the foregoing cases, and we need not repeat what is there said. The charges do not conform to those decisions.

For these errors, the judgment must be reversed, and a new trial granted. It is unnecessary to remark upon the other points in the cause.

Judgment reversed, and new trial awarded.

**CHARLES PAYNE vs. WILLIAM A. STONE, Guardian of Charles F.
and Helen M. Merrick.**

If a person deal with a party, having by law but a limited authority, he can have no right beyond what the authority rightfully exercised would confer. The probate court of Adams county granted to S., guardian, &c., permission "to erect out of the funds of his wards, a building upon their lot in Natchez, of such dimensions and quality as may suit their interest:" *Held*, that the court did not thereby intend to authorize the guardian to erect a building upon credit, and thereby destroy the interest of his wards.

The probate court has no power to authorize the erection of buildings upon the real estate of minors, which may involve the necessity of selling that estate to pay for them.

The probate court of Adams county, upon the petition of S. as guardian of his wards, granted him permission "to erect out of the funds of said wards, a building upon their lot in Natchez, of such dimensions and quality as may suit their interest." Under that order, S. contracted with P. for the erection of a building: when the contract was completed, there were not sufficient funds to pay the expense, and P. filed his petition in the circuit court to obtain an order for the sale of the lot and building under the mechanic's lien law. To this petition a demurrer was filed on behalf of the wards, which was sustained, and the petition dismissed: *Held*, that there was no error in the judgment of the circuit court.

ERROR, from the circuit court of Adams county; Hon. Charles C. Cage, judge.

This was a petition filed in the circuit court of Adams county, to the May term, 1842, by Charles Payne against Charles F. Merrick and Helen M. Merrick, minor heirs of Phineas F. Merrick, deceased, and William A. Stone, their guardian. The petition states that William A. Stone as guardian of the said minors, applied to the probate court of Adams county, for permission to erect a building for said minors on their lot in Natchez, which was granted by said court at the November term thereof, 1840. A copy of the order of the probate court

Payne v. Stone.

granting said permission, is filed as an exhibit to said petition, and is in the following words, to wit: "It is ordered by the court, that William A. and Hannah M. Stone, guardians of Charles F. and Helen M. Merrick, have permission to erect, out of the funds of said wards, a building upon a lot belonging to their estate under the hill, of such dimensions and quality as may suit the interest of said wards." The petition further states that William A. Stone, guardian of said minor heirs, in pursuance of said order of the probate court, erected a brick house on land belonging to the estate of said heirs, and employed Charles Payne to do the carpenter's work thereon; that Payne completed the carpenter's work, and Stone, as guardian of said heirs, owed him therefor the sum of \$3197 67, with interest, and would not pay it; petitioner therefore prayed that the lot and house be sold for the payment of said debt. The guardian and his wards are all made defendants to the petition. The counsel for the minor heirs demurred to the petition on the ground that William A. Stone was not lawfully authorized to make any contract whatever, which could create a lien on their inheritance, and that no contract by him as their guardian is obligatory on them. The court sustained the demurrer, and dismissed the petition, whereupon the petitioner brought the case to this court by writ of error.

J. L. Mathewson, for plaintiff in error.

The first point to which we would call the attention of the court in the discussion of this case, is the power of the probate court of Adams county to grant the order to Stone as guardian, to rebuild the houses, upon which the plaintiff seeks to enforce his lien.

It has been decided repeatedly by this court, that the probate courts of this state, in matters over which it has jurisdiction, has a power equal to the superior court of chancery. 2 How. 861; 3 lb. 252, &c. The laws of this state give the probate courts jurisdiction over all guardians and wards. Then it follows that whatever the superior court of chancery is empowered to do in all matters relating to the powers or duties of

guardian, &c. can be done by the probate courts of this state. We are well aware that courts of chancery will not sanction any extravagant expenditure by the guardian, of his ward's money, nor will they sanction any unnecessary improvement of a minor's estate. But that they would not only countenance, but enforce all contracts made by the guardian for the necessary improvements, there can be no doubt. If a fence be blown down or otherwise destroyed, or if any building necessary for the good or preservation of the interests of the estate of the ward be destroyed, the guardian has certainly the power to rebuild them, if not compelled so to do. In this case the houses belonging to the minor heirs of Merrick, of whom Stone was guardian, were burnt down, and the rent of those buildings being the principal if not the only means of their support, it was the duty of the guardian, in order to protect their interests, to rebuild, and certainly it was left to the discretion of the judge of probate whether it was necessary, and if upon the representation of the guardian he deemed it so, the only question left for this court is his power to grant the order to rebuild. In the case of *Roberts v. Wilson*, 2 Bibb, 597, it was held that equity will compel the performance of a contract by an infant when made by his guardian for his benefit, and to save an estate otherwise in danger of being lost, and in the opinion of this court they reason thus: Thus it is declared that a court of chancery, which in these cases acts upon principles of substantial justice and natural equity, on whom the custody of infants officially devolves, has frequently interposed and held infants to their contracts in cases where at law they would not have been bound. The principle upon which that court proceeds seems to be this, that on one hand, if advantageous contracts were not binding upon the persons contracting with infants, the protection which was intended as a privilege would in that event become a prejudice; so on the other hand, if no agreements would bind infants either in law or equity, that privilege, at the same time that it protected them from prejudice, would debar them from the possibility of reaping any advantage by contracts, as none would treat with those whom they knew

could not be bound. Equity then considers the intrinsic nature of the contract; with what view it is entered into; whether the friends advise and consent to it; who are parties to it; the extent of its influence, and in what degree it has been executed, and directs the conscience of the infant according as these circumstances affect the agreement, thereby giving to such transactions their just efficiency. See Pow. on Con. Such is the view taken by courts of equity of cases similar in character to the one before the court. Whatever a guardian can do, a probate can order him to do if necessary to protect the interests of the ward. In the case of *Borvell's Heirs v. Buckley*, 1 Brock. 356, it is decided that it is within the general powers of a guardian to make a lease of the lands of his ward, and remove incumbrances therefrom; and if a guardian convey certain lands of his wards in trust to secure a debt for which other lands are bound by an elegit, and thus discharge the latter from the incumbrance, a court of equity will sanction the contract, especially if it appears to have been beneficial to his ward. A guardian is bound to rent his ward's lands, &c. *Jones v. Ward*, 10 Yerg. 161.

If then the guardian could rebuild, and the probate court had the power to grant him an order for that purpose, that order must be carried into effect according to the existing laws of the land. This case is a much stronger one than the one referred to in 2 Bibb. There the court sustained a guardian for making a contract subject to a custom only; here it is a law. The mechanic's lien law gives the mechanic a lien upon the buildings he erects, and the lot upon which he builds; no building can be erected unless subject to this lien, and the mechanic, if his employer be in possession of the lot, has a right to its benefits. An innkeeper has a lien upon a horse for his keeping, it matters not to whom he belongs; and a seaman upon a ship for his wages, whoever may be its owner.

Taking this view of the case, we certainly are right in thinking that the court below erred in sustaining the demurrer. It is a case of peculiar hardship upon the poor mechanic, if he can be thus defrauded out of his hard earnings, and that too in

Payne v. Stone.

work which he was employed to do under an order of a court of competent jurisdiction. He stands alone, the infants are entrenched behind the bond which their guardian gave for the faithful performance of his trust; if injured, they can have recourse against him and sureties. But the mechanic stands or falls by this decision; which, then, shall be the sufferer, we leave to the wisdom of this court.

Montgomery and Boyd, for defendants in error.

The plaintiff in error filed a petition in the circuit court of Adams county, to enforce the mechanic's lien on a lot of land in the city of Natchez, belonging to Charles F. Merrick and Helen M. Merrick, infant heirs of P. F. Merrick, deceased. William A. Stone and these minors, his wards, are the defendants to the petition.

The basis of the claim is an instrument under seal, signed by Stone and the petitioner, Payne, in which Payne agrees to do certain work, and Stone "doth for himself, his executors, administrators, covenant and promise to and with the said Charles Payne, his executors, administrators and assigns, well and truly to pay," &c.

The petition also contained an additional claim for extra work, as provided for in the agreement.

In addition to this written agreement, the petition set forth and relied upon an order of the probate court of Adams county, made anterior to the date of this agreement, and is as follows:

"It is ordered by the court, that William A. Stone, and Hannah M. Stone, guardian of Charles F. and Helen M. Merrick, have permission to erect, out of the funds of said wards, a building upon a lot belonging to their estate, under the hill, of such dimensions and quality as may suit the interests of said wards."

This was the whole case, so far as it is now necessary to notice it. The two minors appeared, and demurred to the petition; and on argument and consideration, their demurrer was sustained, and a judgment entered against petitioner for costs.

Payne v. Stone.

No judgment was entered on the demurrer dismissing the petition. And the issue as to Stone, who had appeared and filed a general denial of the petition, remained wholly undisposed of.

For the defendants in error, we insist, there was no final judgment or decree in the case; and that no appeal or writ of error could be prosecuted till the whole case, as to all of the defendants was disposed of. After such a decree, any one of them could appeal, and they need not all join; but before, no appeal lies.

2. This was merely a judgment for costs, no judgment went on the demurrer, and however erroneous it may have been, an appellate court even allows or regards an appeal on a judgment for costs alone. No appeal or writ of error lies on a judgment for costs.

3. The decision on the demurrer was correct. In the first place, Stone's contract was a personal one, and all his covenants were so. In the next place, it was not in his power to create a lien or encumbrance on the real estate of his wards. The probate court could not give him the authority; and in the order referred to by the petitioner, it is manifest no such authority was intended to be given. The court did not attempt to go further than to authorize an investment of the "funds of the wards." This was probably an excess of power, but at all events, was quite a different thing from an authority to mortgage, or otherwise encumber the estate of these infants.

Mr. Justice CLAYTON delivered the opinion of the court.

At the November term, 1840, of the probate court of Adams county, upon the petition of Stone, as guardian of his wards, permission was granted to the guardian "to erect, *out of the funds* of said wards, a building upon their lot, in Natchez, of such dimensions and quality as may suit their interest." Under this order of the court, the guardian contracted with the appellant, Payne, for the erection of a building. The contract was completed; there were no sufficient funds to pay the expense, and Payne filed his petition in the circuit court to obtain an order for the sale of the lot and building, under the mechanic's lien

law. A demurrer in behalf of the infants was filed, which was sustained, and the petition dismissed. From this judgment the case was brought by writ of error to this court.

The first subject for examination is the order of the probate court. If that order do not warrant the sale of the lot, for the expense of the building, or if that court had no power or authority to make an order of that character, then the judgment of the circuit court was correct. If the appellant dealt with a party, having by law but a limited authority, he can have no right beyond what the authority, rightfully exercised, would confer. Its excess would give nothing beyond the lawful limit. This is true as well in reference to the acts of the court as of the guardian.

A fair construction of the order made by the probate court will not justify the conclusion that it meant to authorize the destruction of the interest of the infants. The language employed is measured and cautious. The building is authorized to be erected out of their funds, and to be suitable to their interest. The building erected was in fact not out of their funds, but upon credit; and so far from being suitable to their interest, it is sought to make it involve the destruction of that interest.

But if the probate court intended, under any contingency, a sale of the lot, had it power to make such order?

There are two cases in which the sale of an infant's real estate may be made by the guardian, under an order of that court. First, "when upon full investigation, it may be found that the personal estate and the rents and profits of the real estate are not sufficient for the maintenance and education of the ward." H. & H. 338, sect. 9. Second, "when, in the opinion of that court, such sale shall be for the interest of the minors." H. & H. 417, sect. 110, 113. But a bare inspection of the statute shows very plainly, that no sale is contemplated by it, in a state of case like the present.

On the whole, we are of opinion that the probate court has no power to authorize the erection of buildings upon the real estate of minors, which may involve the necessity of selling that estate to pay for them; and we think, moreover, that it

Payne v. Stone.

was not the intention of the probate court to authorize any such proceeding by the order made in this instance.

We do not undertake to pass upon the rights of Payne in other respects; but confine ourselves to the remedy pursued. His rights against Stone, or to proceed against the rents and profits of the lot, to the extent that his improvements may have added to them, are matters not now before us, and which we do not touch.

The judgment is affirmed.

**DANIEL W. DULANEY and THOMAS W. DULANEY vs. PETER B. STARKE
and SAMUEL F. BUTTERWORTH.**

Where the assignees of a turnpike road company sue for tolls for passing over their road, it is not necessary to make profert in the declaration of the grant of franchise, the transfer, and the authority to exact toll; they are all matters of evidence.

D. sued S. & B. to recover tolls for the passage of their stages over the turnpike road of D.; the declaration alleged, that S. & B. were indebted to D. for certain tolls due for passage on and over the turnpike road of D., which had been duly granted by an act of the legislature of the state of Mississippi to G. and by G. transferred to D.; S. & B. demurred to the declaration and the court sustained the demurrer: *Held*, that the declaration was good, and the demurrer should have been overruled.

ERROR from the circuit court of Lowndes county; Hon. Hendley S. Bennett, judge.

This was an action of assumpsit, brought by Daniel W. Dulaney and Thomas W. Dulaney, partners, trading under the name and style of Daniel W. Dulaney & Son, against Peter B. Starke and Samuel F. Butterworth, partners, under the name and style of Starke & Butterworth, to recover tolls alleged to be due the plaintiffs, for the passage of the defendant's stages over a turnpike road. The declaration contained two counts; the first averred that on the 2d day of July, 1842, the defendants were indebted to the plaintiffs "in the sum of one thousand and fourteen dollars, for divers tolls and duties due, and of right payable, by the said defendants to the said plaintiffs, for the passage of drivers, wagons, stages and horses, of the said defendants, at their special instance and request, on and over the turnpike road and through the turnpike gate of the said plaintiffs; which said turnpike had been before that time duly granted by an act of the legislature of the state of Mississippi, in such case made and provided to Grabel and Grant Lincecum, and which had also before that time been transferred and assigned

to the said plaintiffs, and of which the said plaintiffs were thereof lawfully possessed, and on account thereof rightfully entitled to have and demand of and from the said defendants, for the passage of their said wagons, stages, and horses, as aforesaid, at their request aforesaid, the said sum of one thousand and fourteen dollars; and being so indebted, and in consideration thereof," &c. The second count was substantially the same as the first, the only difference being an averment in the second, that the turnpike "had been duly granted by an order of the board of county police of Octibbeha county, (they having jurisdiction of the same, and lawfully authorized so to do) to a certain James Jones, and by him duly transferred and assigned to the plaintiffs," instead of averring that the grant was made by an act of the legislature of the state of Mississippi to Grabel and Grant Lincecum, and transferred and assigned by them to the plaintiffs. The defendants demurred to the declaration, and assigned the following causes of demurrer, to wit:

"1st. Duplicity and multifariousness.

"2d. The title to the turnpike road is not sufficiently set out in the narration.

"3d. It does not appear that the conveyances or transfers of said incorporeal hereditament were by deed.

"4th. This narration shows no title to said turnpike in the plaintiffs, nor any authority to charge tolls for crossing the same.

"5th. The narration does not set out the nature and terms of the grant from the state; nor from the county of Octibbeha; nor the rate of tolls which they are authorized to charge by said grants.

"6th. The narration shows no cause of action against the defendants, and is informal and altogether insufficient."

The court sustained the demurrer, and ordered the declaration to be dismissed, to reverse which, the plaintiff now prosecutes this writ of error.

Jack, for plaintiffs in error.

The question involved is, when a franchise has been duly granted to charge tolls, is the person lawfully in possession,

claiming the right, and with whom the defendant contracts, compelled to show title, by deed, before he can maintain action for the tolls; or is the allegation that the plaintiffs were in possession under the grants, and rightfully entitled to have the tolls, sufficient? We think that the averment of the grant of the franchise by the proper authority, and that the plaintiffs were lawfully possessed under the grantees and entitled to the tolls, and that the defendants are indebted at their special instance and request, are sufficient and all that ought to be alleged or proved to sustain the action. For the correctness of these views, I refer the court to the principle that possession or qualified right, is sufficient to sustain trespass or trover, (*Harris v. Newman*, 5 How. R. 654,) and for a stronger reason, would support the action of assumpsit on the contract of the party, and I ask that the decision sustaining the demurrer be reversed and the cause remanded.

W. P. Harris, for defendants in error.

It is difficult to determine whether the pleader intended to rely upon the possession or the title of the plaintiffs; but in either case, the allegations in the declaration are insufficient.

The rules of pleading require that the declaration should contain the facts on which the plaintiff's right of action depends. If it arises upon contract, the contract should be stated; if upon a legal liability, independent of contract, the circumstances which create such liability should be set out. 1 Chitty Pl. 291, 302.

The decisions relied on to support the declaration, perhaps establish what is an anomaly in pleading, that indebitatus assumpsit for tolls, customs, fines, &c., though title must be proved, it need not be alleged; but giving to these decisions the authority claimed for them, they do not relax the rule above laid down. They amount, in effect to this, that the plaintiff need not state the interest which he has in the franchise, and in right of which he demands tolls, &c.

The interest which a particular individual may have in a franchise is not, however, the foundation of the liability of the public to pay tolls.

Such liability does not depend upon who for the time being may be in possession of a franchise, or the particular title by which such possession may be supported. It depends upon whether such franchise has a legal and authorized existence, or in other words, whether by legislative grant, or by leave from any tribunal, capable of conferring it, such franchise has been established, or an exclusive right against the public conferred. The one relates to whether tolls can be demanded at all; the other to the question whether the individual suing is the one to whom the tolls are due. The decisions alluded to, may relieve a party from defining the interest or title by which he claims such tolls to be due to him, but they do not relieve him from laying the foundation for a suit against the defendant.

I insist, therefore, that the plaintiff should have averred that the franchise had been legally established; the simple averment that the right to take tolls was granted by the legislature is not sufficient; if the grant ought to have been stated it was necessary to set it out in its terms. Stephen on Pl. 329.

The same may be said of the count in which it is stated that the right to demand tolls was conferred by the police court; the order should have been fully set out. 1 Saund. 298. And even then, it would remain to be shown that the board of police can establish a franchise; the power to regulate the rate of tolls does not include the power to grant franchises.

Mr. Justice CLAYTON delivered the opinion of the court.

This is an action of assumpsit, brought to recover tolls alleged to be due from the defendants in error, to the plaintiffs, for the passage of their stages over a turnpike road, for the space of three years. There was a demurrer to the declaration, which was sustained in the court below, and judgment rendered for the defendants.

The plaintiffs claim under a transfer of the franchise from the original grantees. Several causes of demurrer are assigned, part, only, of which need be considered. The second cause states that the title to the turnpike is not sufficiently set out; the third, that it does not appear that the transfer was by deed; and fourth, that no title to the turnpike is shown, nor any authority to charge tolls.

The declaration contains two counts; the first alleges that the defendants were indebted to the plaintiffs for certain tolls, due for passage on and over the turnpike road of the plaintiffs, which had been duly granted by an act of the legislature of the state of Mississippi to G. & G. Lincecum, and by them transferred and assigned to the plaintiffs.

The second count is substantially the same, except that it alleges that the franchise was granted by the board of police of Octibbeha county, they having jurisdiction of the same, and being lawfully authorized so to do.

We cannot perceive any valid objection to this declaration. It is, in all respects, as full as the forms contained in the books. There is no necessity that the transfer should be by deed. The grant of franchise, the transfer, the authority to exact toll, are all matters of evidence. It is no more necessary to make profer of them in the declaration, than it is to set out the title papers for land in an action for its use and occupation.

The judgment is reversed and cause remanded.

JOHN R. WOOTEN et al. vs. DANIEL MILLER.

In 1837, D. M., a citizen of North Carolina, placed in the possession of W., about to move to the state of Mississippi, a negro man to be sold or hired for him; W. brought the slave to this state and sold him here to M. on a credit, and took M.'s note, and transferred it to his father in payment of a debt due by him to his father; the note was afterwards paid; and D. M. sued W. and his father in equity to recover the money, charging them with a fraudulent combination to cheat him out of it: *Held*, that the complainant was not entitled to recover; the introduction of the slave into this state was in violation of the law and constitution, and any contract, growing out of, or connected with, such violation will not be enforced.

Where a non-resident employs an agent in this state to introduce or sell slaves here for him, and the agent does so introduce and sell the slaves, the principal cannot recover from the agent the proceeds of their sale; the non-residence of the principal not shielding him from the operation of our laws.

If the contract of a foreigner is to be completed in, or has reference to its execution in, a foreign country, and is repugnant to the laws of that country, he is bound by them.

IN error from the vice-chancery court at Columbus; Hon. Henry Dickinson, vice-chancellor.

Daniel Miller, a citizen of North Carolina, alleges in his bill, that in 1837 he delivered to John R. Wooten, then about to move into this state, his negro man Tony, to sell or hire here for him; that Wooten brought the slave here and sold him to one Moore for \$1050, and took his note therefor, payable at a future day, and transferred the note fraudulently to Robert Wooten, his father, who was cognizant of all the facts, and bought with the note a tract of land from one Prewett, to whom Moore afterwards paid the note. That the Wootens studiously concealed these facts from him, and wrote him false and deceptive letters, and had combined to defraud him. The bill prays that the money might be decreed to be paid.

To this bill the defendants filed a general demurrer, on the

ground that the slave was introduced into the state in violation of law, and that the contract was void; and if there was any remedy it was at law.

The vice-chancellor overruled the demurrer because the allegations of fraud were not answered.

Whereupon the defendants answered, John R. Wooten insisting that the contract of sale was void and all the contracts that grew out of it; averred his intention to pay the money until he found that the law had been violated, which he did not know at the time of sale, nor until long after. That Robert Wooten gave full consideration for the note; he took it in payment of a debt due by John R. to him. Both answers insist on the demurrer, on the ground of the contract being illegal and void.

The vice-chancellor decreed that the defendants should pay the amount of the note with interest; and they sued out this writ of error

Adam Y. Smith, for plaintiff in error.

1. The court erred in overruling the first demurrer. The order overruling states the cause, to wit, because there is no answer denying fraud. I am aware that fraud must be denied, &c., but that is only where the charge of fraud is based upon facts that support it. 6 How. R. 313, 314. If the facts of the bill do not therefore amount to fraud in law as between the parties, there was no necessity of denying the fraud charged.

This court has decided in 5 How. 80, and 769, that the contract for the sale of a slave, so introduced, is absolutely void. Following up this decision, it is decided in Freeman, p. 38, that the title remains with the vendor, and if the title remains with the vendor, of course the note he takes from the vendee is a nullity, and the whole thing is as though it was not.

2. Complainant below seems to rely upon the principle, "that money paid to an agent may be recovered by the principal, although the money is the fruit of an illegal transaction;" authorities are quoted in brief in support. The principle is correct, provided the agent has had no connection with the illegal transaction. It has no application here, the Wootens were connected

with the transaction, they were *particeps criminis* from the beginning; and indeed they never received any money from the transaction or anything else, if the note was a nullity. In *Farmer v. Russell*, 1 Bos. & Pull. 295, it was held, If A. is indebted to B. on a contract forbidden by law, and pays the money to C. for B., B. can recover it of C. Eyre said that plaintiff's demand arose simply from the circumstance that money was put in the hands of C. for his use, C. having had no connection with the illegal transaction.

3. But it is said, that "the rule *pari delicto*, &c. is not of universal application; that of two engaged in an illegal transaction, one may be more guilty than another, and that consequently chancery will relieve against him who is most guilty." I admit this doctrine to be true, but it has no application here. Lord Mansfield, in *Douglass*, 696, n. and *Cowp.* 790, and quoted by Chief Justice Parker, in 11 Mass. R. 376, 377, with great approbation, lays down the true doctrine and shows its application: "Where acts are made illegal by statute to protect the weak and unwary, there relief will be granted in favor of the oppressed, as in contemplation of law the least guilty. But in all cases where they are made unlawful by statute, because immoral or against *public policy*, there all are *in pari delicto*, and *potior est conditio defendentis*; the contract now under consideration belongs to the latter class, (5 How. R. 80—768,) and I believe all the cases in this court on the subject.

4. Reference is made to the principle that where one is in a situation to take advantage of another, and does so by betraying trust, &c. chancery will relieve this, it is true; but those cases are where persons take advantage of weakness or confidence in making unconscionable contracts, not illegal ones. The contract is not illegal, but fraudulent, and therefore void, as the case given where a father inveigles a weak and confiding son into a contract, whereby he got his property for one quarter of its value. An attentive examination of the authorities cited by the gentlemen will show that I am correct.

5. Counsel quote *Rowan & Harris v. Adams et al.* 1 S. & M. Ch. R. 45. This case merely conforms to the well-established

doctrine, that the law leaves parties to an illegal contract where she finds them. 4 Peters. 184; 8 Term R. 575; 11 Mass. R. 368 — 377; 8 D. & E. 575, overruling 7 D. & E. 535. Unless he first purify himself from the taint of illegality, a borrower of money who seeks to avoid a recovery on the ground of usury, must do justice, by paying the amount due, less the usury. 1 J. C. R. 307; 1 Wash. R. 196; 1 Story's Eq. 300.

6. I will forbear any remarks in relation to the attitude the plaintiffs in error occupy before this court; indeed all defendants in this class of cases, generally appear unworthy the favorable consideration of court; and to very unsophisticated individuals it may seem exceedingly strange that they obtain it. But the court do not grant favors to them on account of their merits by any means; it is *pro bono publico*. 16 J. R. 487.

Harris and Harrison, for defendant in error.

1. The original demurrer was properly overruled because there was no answer denying the fraud and combination charged, and the facts upon which the charge was founded. Rule 6th, sec. 1, chancery court. *Niles et al. v. Anderson et al.* 5 How. 364.

A demurrer being overruled, no other demurrer shall thereafter be received, but the defendant shall proceed to answer the bill. Rule 6th, sec. 3d, chancery court.

2. What connection is there between the fraud and deception practised by the defendants in concert with each other, and the original transaction? Even though the note had a "primal curse" upon it, that cannot sanctify the fraud of the defendants. They are not in an attitude to say "*In pari delicto potior est conditio possidentis et defendentis.*"

"In cases where both parties are *in delicto*, concurring in an illegal act, it does not always follow that they stand *in pari delicto*"; for there may be, and often are, different degrees in their guilt. 1 Story's Eq. 306, sect. 300. *Osborne v. Williams*, 18 Vesey, 379; *Morris v. McCullough*, Ambler R. 432; *Goldsmith v. Brunning*, 1 Brown's Ch. R. 543; 2 Story's Eq. 8, sect. 695.

The rule *in pari delicto*, &c. is not universal in its application. 1 Story's Eq. 302, sect. 298; 18 Vesey, 379.

The courts often interfere in cases which arise from some confidential or fiduciary relation between the parties, "where but for such peculiar relation they would abstain from granting relief." 1 Story's Eq. 311, sect. 307.

"Courts of equity acting on this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive *advantage* from that circumstance, for it is founded in a *breach of confidence*." Ib. 312, sect. 308.

"The general principle which governs in all cases of this sort, is that, if a confidence is reposed, and that confidence is *abused*, courts of equity will grant relief." 1 Story's Eq. 312, sect. 308, Principal & Agent; Ib. 319, sect. 315. And "where a creditor receives the transfer of a note in payment of a precedent debt, he takes it, although transferred to him before maturity, subject to all equities, &c. 10 Wend. 85; 20 J. R. 637; 1 S. & M. Ch. R. 45.

"If money has been actually paid to an agent for the use of his principal, the legality of the transaction of which it is the fruit does not affect the right of the principal to recover it out of the agent's hands, &c. &c." Paley on Agency, 60, 61.

"For although the law would not have assisted the principal by enforcing the recovery from the party by whom it was paid, because it is the policy of the law not to aid in the completion of an illegal contract, yet when that contract is at an end, the agent whose liability arises solely from the fact of having received the money for another's use, can have no pretence to retain it." Paley on Agency, 60; 1 Livermore on Agents, 469, 470, 471; *Tenant v. Elliott*, 1 Bos. & Pul. 3; Ib. *Farmer v. Russell*, 296; *Armstrong v. Toler*, 11 Wheat. 258; 6 Cond. R. 306; *Rowan & Harris v. Adams*, 1 S. & M. Ch. R. 45.

4. Besides, if there was really no *intention* to violate the statute, will the court *impute* one, and say the parties were *in delicto*? Ignorance of the law is not, as a general rule, an *excuse*; but that principle does not apply to a case like the present, where

Wooten et al. v. Miller.

the *actual intent* and *unlawful design* constitute the only reason why the court *withholds* its assistance. A party is not guilty, in the sense of the maxim *in pari delicto*, unless he knowingly participates in the common unlawful design. There must be that *intent* which constitutes guilt in fact and in the odious sense of the term.

Mr. Justice CLAYTON delivered the opinion of the court.

The complainant, a resident of the state of North Carolina, in the year 1837 placed in the possession of the defendant, John R. Wooten, then about to move to the state of Mississippi, a negro man named Tony, to be sold or hired by said Wooten for him. The slave was brought to this state by said Wooten, and sold to one Moore for \$1050, upon a credit. Wooten took Moore's note for the amount, and on 3d November, 1839, transferred it to his father and co-defendant, Robert Wooten, in payment of a debt due from the son to the father. The note was afterwards paid, and this bill is filed against the two Wootens, charging them with a fraudulent combination to cheat the complainant out of the value of the note, and praying for a decree for the payment of the money.

Both defendants have filed an answer and a demurrer, in which the illegality of the original transaction, and its violation of the laws and policy of this state, are insisted on by way of defence.

The principle is established beyond controversy, that a contract in violation of law, or against public policy, cannot be enforced in the courts of the country. *Brian v. Williamson*, 7 How.; *Armstrong v. Toler*, 11 Wheat.; *Craig v. Missouri*, 4 Peters. It is also settled in this state that a note given for the price of a slave introduced into this state as merchandise, or for sale since 1st May, 1833, is void, because contrary to law. If, therefore, this were a proceeding by the complainant against Moore, the purchaser of the slave, to recover the price, it is very manifest, under the decisions of this court, that no recovery could be had. Is the present attitude of the case materially different?

Perhaps the rule is nowhere stated with more clearness than in *Armstrong v. Toler*, 11 Wheat. 258 : "Where the contract grows immediately out of, and is connected with an illegal or immoral act, a court will not lend its aid to enforce it. But if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, and a recovery may be had." In *Simpson v. Bloss*, 7 Taunt. 246 (2 Eng. C. L. Rep. 89,) it is stated, that "the test whether a demand connected with an illegal transaction, can be enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case." This rule is cited and sanctioned in *Roby v. West*, 4 N. Hamp. 290.

Now in the case before us, the complainant sets out his contract with John R. Wooten, as the foundation of his claim. Robert Wooten received the benefit of the sale of the negro, but the complainant cannot establish any claim against Robert Wooten, without resort to the original contract with John. That contract involved a violation of the laws of Mississippi; it was invalid, and we could not decide for the complainant without giving sanction and efficacy to that contract.

There are cases which decide that where the demand is collateral to the original transaction, as where money has been loaned to pay an illegal debt, although the lender knew the illegal purpose, he may recover. Of this class are *Faikney v. Regnons*, 4 Burr.; *Petrie v. Hannay*, 3 T. R. But the principle upon which they go would not be applicable here, unless there had been some collateral undertaking of Robert Wooten to pay.

At one time it occurred to us as possible that the complainant, being a resident of another state, could not be charged with a knowledge of our laws; thus falling within the case of *Haven v. Foster*, 9 Pick. R. 112. Farther investigation satisfied us, that the true principle on this head is laid down in 2 Wash. C. C. R. 104; "that if the contract of a foreigner is to be completed in, or has reference to its execution in a foreign country, and is repugnant to the laws of that country, he is bound by them."

We have nothing to say in behalf of the morality of this

transaction, nor in favor of those who make the defence, but as they interpose the law as a shield, we cannot do less than say it covers and protects them.

The decree of the vice-chancellor must be reversed, and the bill dismissed, but each party to pay his own costs in the court below.

Decree reversed.

RICHARD HUTCHESON vs. JAMES M. MINIS.

M. purchased at marshal's sale two negroes, and sold them to H., who gave his notes for the purchase-money; M., when the notes became due, sued H. on the notes and recovered judgment, and H. moved for a new trial: it was proved that H. wanted to purchase the negroes for his daughter, but was unwilling to do so unless the title of M. was good; that M. refused to give any more than a bare quitclaim to the negroes; that M. purchased them under an execution against A. W. H., against whom there was also another judgment which was known to both M. and H., and its lien canvassed at the time H. was contracting with M. for the negroes; that they both then believed that M.'s title to the negroes, acquired by his purchase at the marshal's sale, was paramount to the lien of the other judgment, and under that impression H. purchased the negroes, and gave his notes, and received from M. his quitclaim; and that the negroes were subsequently seized and sold under an execution which issued on the other judgment. The court overruled the motion for a new trial: *Held*, that both parties were equally cognizant of the facts relative to the title of M. to the negroes; that M. was guilty of no fraud, and the motion was properly overruled.

ERROR from the circuit court of Monroe county; Hon. Stephen Adams, judge.

This was an action of assumpsit, brought by James M. Minis against Richard Hutcheson, in the circuit court of the county of Monroe, to the April term, 1843, founded upon fourteen promissory notes given by the defendant to the plaintiff on the 4th day of November, 1841, due and payable on or before the 1st day of March, 1842; twelve of which were for the sum of fifty dollars each, and two for forty dollars each, amounting in all to the sum of six hundred and eighty dollars. The defendant pleaded the general issue.

On the 30th day of April, 1845, the cause was tried, and a verdict and judgment were rendered in favor of the plaintiff for the sum of \$852 26.

On the 8th day of May, 1845, and during the same term of

the court, the defendant, by his counsel, moved the court for a new trial, upon the ground "that the finding of the jury was contrary to law and evidence.

This motion was overruled by the court, and the defendant filed a bill of exceptions, setting out all the evidence.

The bill of exceptions shows, that the plaintiff introduced upon the trial and read to the jury the fourteen promissory notes sued on, and rested his case.

The defendant then proved that said notes were given to secure the purchase money of two negroes, Violet and Henry ; which had once been the property of one Andrew W. Hardy, and had been sold by the marshal of the northern district of Mississippi, as his property, to satisfy an execution in favor of Ledyard, Hatter & Co. against him, which was issued on a judgment obtained at the June term, 1839, of the district court of the United States, at Pontotoc. That the plaintiff became the purchaser of said negroes, at the marshal's sale, for the sum of six hundred and fifty dollars ; that soon after, he purchased, he proposed, through his agent and brother-in-law, Parker Alexander, to sell them to the defendant, Hutcheson. The defendant stated that he desired to purchase them for his daughter, the wife of Andrew W. Hardy, but he would not do so unless the plaintiff's title was good ; that he was old and did not wish to buy a law-suit ; that the sale from the plaintiff to the defendant was effected by Parker Alexander, at which the plaintiff, defendant, Parker Alexander, and Andrew W. Hardy were all present, at the house of Hardy, where the negroes were ; that at the time of the sale they all conversed freely about an older judgment outstanding and unsatisfied against said Hardy ; that all knew Hardy was insolvent, and the only doubt relative to the title was, whether the older, unsatisfied judgment, in the circuit court of Monroe, did not bind the property ; that the knowledge of that judgment induced the defendant to refuse to purchase said negroes at first, and state that he was old and would not buy a law-suit ; that Andrew W. Hardy, who was the son-in-law of the defendant, was desirous that the defendant should purchase the negroes, in order that his wife might have the use of them ;

Hutcheson v. Minis.

that the plaintiff, Hardy, and Alexander, all expressed the opinion that the title of the plaintiff, under the marshal's sale was good. The defendant finally agreed to purchase the negroes, and executed the notes sued on, and took a quitclaim title from the plaintiff, that being the only kind of title the plaintiff was willing to give, and left the negroes in the possession of Hardy, his son-in-law; that Hardy agreed with his father-in-law, if he would purchase the negroes, he, Hardy, would repay the money for them, when able to do so, and should he fail, the defendant could give him that much less at his death.

The defendant, also, proved the existence of an older judgment, in the circuit court of the county of Monroe; that an execution founded upon this older judgment, was levied upon said negroes, Violet and Henry; that the defendant interposed his claim against said execution, tried the right of property, which resulted against him, and the negroes were again sold as the property of said Hardy to satisfy said older judgment.

The plaintiff then proved, that at the time of the sale of the negroes to the defendant, they were worth a thousand dollars; that they were then in the possession of A. W. Hardy, by the permission of the plaintiff, under a promise from him, made at the time he purchased them at the marshal's sale, that Hardy might redeem them, if he could do so.

This was all the testimony in the cause.

The defendant brought the case to this court by writ of error.

R. Davis, for plaintiff in error.

The grounds relied on to reverse the judgment in this case are, first, that the contract for the sale and purchase of the negroes, Violet and Henry, was made in mutual error, under circumstances material to the trade, which render it void.

No question in the science of jurisprudence is better established than that total ignorance of the title, founded in a mistake of a plain and settled principle of law, misrepresentation, imposition, undue influence, misplaced confidence, and surprise, will abrogate and annul a sale for the purchase of property to which the title is defective. See 16 Ves. 72; 1 Veas. & Beam.

524; 1 Story on Eq. Juris. 132-138, 149, 152; Madd. Ch. Pr. 60; Mitford's Eq. Pl. 129; Newland on Contracts in Equity, 432. These authorities too fully sustain the proposition assumed to admit of cavil.

It is manifest the plaintiff in error purchased ignorant of his rights, and was induced to do so by misrepresentation, imposition, undue influence, and misplaced confidence. He had not proposed the purchase; it was the suggestion of the defendant in error, who procured his brother-in-law to hunt out this old man, ready to lie down in the grave, as the victim of his purposes, expecting, I apprehend, to exert an undue influence on his actions by softening his sympathies, by pointing him to the distressed condition of his daughter, and induce him to purchase property to which the title was defective. By these means of art and stratagem the misplaced confidence of the old man was betrayed into the purchase of the negroes, to whom he acquired no title, and which has become to him an entire loss, after much expense in defending the same, and much more harassment of feelings in his old age, when he required repose.

Now if the defendant in error intended no imposition, why did he induce his brother-in-law to see the plaintiff in error, in relation to the purchase of the negroes? and why did he have him decoyed to the house of Hardy, and then when the conversation was had in regard to the title, remain profoundly silent? More than this, why did he sell the negroes for a price so much less than their value, and give a bill of sale with a warranty of title? Can the court believe that if the confidence of the plaintiff in error had not been misplaced, he ever would have purchased the negroes? Had he not been ignorant of the title he was getting would he have purchased? Were not gross misrepresentations made in regard to the effects of the lien in favor of the older judgment? And more undue influences exerted upon him doubtless there were. The rule here advanced has been fully recognized in the courts of this country. See 1 Story's Eq. Juris. 153; 1 Johns. Ch. R. 512; 2 Ibid. 51; 6 Johns. R. 169; 8 Wheaton, 211; 1 Peters's S. C. R. 1; 12 Ibid. 32.

The next and remaining ground to which I shall direct the attention of the court, is, that *fraud* marks this whole transaction, which is so manifest from the views above presented, that I will not trouble the court with an argument upon this point.

John Goodwin, for defendant in error.

The counsel for the plaintiff in error, insists,

1. That the sale of the negroes, Violet and Henry, was made in mutual error, under circumstances material to the contract, which render it void.

2. That the sale was procured by fraud, and therefore void.

These positions are evidently contradictory; the first cannot be maintained upon principle, nor the second by the facts. It is contended, in this case, that the negroes were purchased by the plaintiff in error, under a mistake of a well-settled principle of law, but not under a mistake of fact. The question is presented, how far, and under what circumstances, does the law relieve a man against mistakes? Mistakes are ordinarily divided into two sorts; mistakes in matter of law, and mistakes in matter of fact. In regard to mistakes of matter of law, it is a well known maxim, that ignorance of the law will not furnish an excuse for any person, either for a breach or an omission of duty; *ignorantia legis neminem excusat*; and this maxim is equally as much respected in equity as in law. Story's Eq. Jurisp. 121. The ground assumed cannot be sustained in a court of law; and no case can be found where the naked principle, that relief may be granted on account of ignorance of the law, is asserted in the books. This is the doctrine held in the case of *Hunt v. Rousmanier*, 8 Wheat. 174. The legal signification of the term, mistake in law, is, where the party had full knowledge of the facts upon which he acted, but misunderstood, or misapplied, the law arising upon such a state of facts. Jeremy's Eq. Jurisp. 358. Courts of equity, which alone can take jurisdiction of, and correct mistakes, either in law or fact, hold, that ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts. Fonbl. Eq. b. I. ch. 2, sec. 7; 1 Madd. Ch. Pr. 60; 3 P. Will. 127;

Shotwell v. Murray, 1 Johns. Ch. R. 512; 4 Mass. R. 342. The presumption is, that every one is acquainted with his own rights, provided he had a reasonable opportunity to know them. And nothing can be more liable to abuse, than to permit a person to reclaim his property upon the mere pretence, that at the time of parting with it he was ignorant of the law acting upon his title. *Storrs v. Baker*, 6 Johns. Ch. R. 169.

The proof does not show any misrepresentation, imposition, undue influence, mental imbecility, undue confidence, or surprise. But upon the contrary, the proof shows conclusively that the parties dealt with each other at arms-length, the plaintiff in error confiding in his own opinion, and relying upon his own judgment.

The plaintiff in error undertook to decide for himself the legal effect of the elder judgment, which was in existence against Hardy, and under which the negroes were afterwards sold; and if this opinion afterwards turned out to be erroneous, he must abide the consequences. The case of *Shotwell v. Murray*, 1 Johns. Ch. R. 512, is decisive of this case. In that case the court decide, that a sale under a second or junior judgment, is not of itself a waiver of the plaintiff's rights under a first or elder judgment. Every person is bound to know the law; and where there is no mistake as to the fact, but as to the legal consequence, and that on a collateral point, there can be no ground of relief, either by vacating the sale, or by a perpetual injunction against the exercise of the defendant's rights. The court further say, "that it is a decisive fact, in this case, that when the plaintiff made the purchase he *knew* that such a prior judgment existed, and it was *his* business to make further inquiry upon the subject of that judgment, if such inquiry should become material. It was not incumbent on the defendant to tell the plaintiff that the former judgment would bind the land, notwithstanding the purchase, for that was a legal consequence, with which the defendant must be presumed to have been acquainted." In this case, Hutcheson knew of the existence of the elder judgment against Hardy, and whether that judgment bound the negroes he was about to purchase, was a

legal consequence, which he was bound to know. Minis concealed no fact of which Hutcheson was ignorant; and a person cannot be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences which flow from those facts. This is a settled principle of law and sound policy.

The circumstance of the plaintiff in error taking a bill of sale, without warranty, implies a knowledge of doubtful title. The doctrine of *caveat emptor* is a fixed maxim, applicable alike to the transfer of lands and chattels. *Smith & Montgomery v. Winston & Lawson, Executors of Kyle*, 2 How. 601.

On the trial below, the plaintiff objected to no testimony that was offered, and the defendant was suffered to prove any and everything he could, whether legal or illegal. No instructions were asked by the counsel on either side, and after a full investigation, the jury found a verdict for the plaintiff, which they were warranted in doing.

Motions for new trials are addressed to the sound legal discretion of the court, and should not be granted unless the application discloses sufficient ground to render it probable that justice has not been done. 1 Peters's R. 183; 1 How. R. 19. The general rule is, that a verdict will not be disturbed, but when it is manifest that the verdict is without evidence to support it. 2 Hill's R. 524; 3 Dev. R. 34; Ibid. 112; 4 Ibid. 232. It is insisted, therefore, that the verdict of the jury is sustained by the law and testimony; and that the circuit court did not err in refusing to grant a new trial.

R. Davis, in reply.

It is admitted that ignorance of the law is no excuse, as a general rule, subject, however, to the exception contained in this class of cases, as shown by the authorities referred to.

The doctrine of *caveat emptor* cannot apply in this case, because the vendor of property can never protect himself by that doctrine. Third persons, whose rights have been affected by the sale, can only avail themselves of that doctrine.

Mr. Justice THACHER delivered the opinion of the court.

This case comes up upon a motion for a new trial overruled. The facts of the case were, that the defendant in error instituted his action in the circuit court of Monroe county, against the plaintiff in error, upon his fourteen promissory notes, the aggregate amount of which was six hundred and eighty dollars. The defendant below showed upon the trial that the notes were given to secure the purchase-money of two slaves, Violet and Henry; that the plaintiff below purchased the slaves at a marshal's sale, under an execution against one Andrew W. Hardy; that the defendant below was desirous to purchase the slaves for his daughter, who was the wife of said Hardy, but was unwilling to purchase them unless the title of the plaintiff below to the slaves was good; that finally the purchase was made by the defendant below, at the house of said Hardy, at which time the priority of lien of another judgment against Hardy was talked about and canvassed, upon which subject the plaintiff below, as well as others, expressed the opinion that the title under the marshal's sale was paramount to the lien under consideration; that Hardy urged the purchase by his father-in-law, promising to repay him the amount of the purchase-money, or to submit to a correspondent deduction in the distribution of his father-in-law's property by will; that the plaintiff below gave and was willing to give to the defendant only a quitclaim title to the slaves; and that the slaves were subsequently seized and sold under the judgment which had been the subject of conversation above mentioned.

The evidence exhibits that both parties were equally cognizant of the facts relative to the title of the plaintiff below to the slaves. It is clear that the defendant below knew of the existence of another judgment against his son-in-law, and he could have made inquiry respecting the effect it might have upon the slaves. The mistake was in the legal effect of that judgment. That mistake was not occasioned by the fraud, or even instrumentality of the plaintiff below, for, on the contrary, he held out a warning to his purchaser, by declining to make other than a bare quitclaim to the slaves. The circumstances,

396 HIGH COURT OF ERRORS AND APPEALS.

Hutcheson v. Minis.

therefore, do not present anything that can fairly affect the validity of the sale, or require the court below to grant the motion for a new trial. 1 Johns. Ch. R. 512.

Judgment affirmed.

JAMES N. HARPER vs. JEROME N. BONDURANT.

It is error, where four pleas are filed in a case, and issues joined to the country on two of them, and demurrer filed to the other two, to proceed to trial and judgment on the issues to the country, without any disposal of the demurrers.

IN error from the Yalabusha circuit court; Hon. Benjamin F. Caruthers, judge.

Jerome W. Bondurant sued James N. Harper in an action of debt on a bill single, made by the defendant and James Foster. The defendant plead, 1. *Non est factum*; 2. That the defendant was a surety for Foster, and the plaintiff had refused to sue Foster until he had become insolvent, and gone beyond the jurisdiction of the court. 3. That the bond sued on, was a subsisting debt of Foster to Bondurant, to which the defendant afterwards affixed his name without consideration, to him or Foster. 4. That the bond was signed, sealed and delivered by Foster to the plaintiff, without the knowledge, privity or consent of the defendant who was a surety. On the first and third pleas an issue was joined to the country; and to the third and fourth a demurrer was filed; which demurrer, so far as the record shows, was undisposed of. A jury was empanelled, who found for the plaintiff; and the defendant sued out this writ of error.

Waul, for plaintiff in error.

In examining the record, I find there is no judgment of the court upon the demurrer; this was error.

Davidson, for defendant in error.

Mr. Justice THACHER delivered the opinion of the court.

In this action, the record exhibits that a demurrer was filed to the third and fourth pleas of the defendant below, and an

Harper v. Bondurant.

issue joined upon the first and second ; it further exhibits a trial, verdict and judgment in the case without any disposal of the demurrer to the third and fourth pleas. This was error. The argument of counsel proceeds upon the supposition that the demurrer was sustained by the court below, but there is no evidence in the record, of such an interlocutory judgment having been made, and therefore the sufficiency of the causes assigned in the demurrer, is not properly a question pending in this court.

The judgment must be reversed, and the cause remanded for further proceedings.

JAMES WELLONS, Executor of MARCUS PIERCE vs. CAMP P.
NEWELL et al.

Although a judgment without notice is void, yet if a bill be filed to obtain a new trial at law, on the ground of want of notice of the pendency of the action at law, and the answer deny the want of notice, and there be no proof to sustain the allegation of the bill, the bill must be dismissed; yet without prejudice if there has been no trial in the court below on the merits.

N. filed a bill to obtain relief in equity against a judgment at law, in favor of D. on a note, which he averred he executed as a surety for the principal therein, with the understanding that D. was to be a co-surety with him; but that D. was made payee, and indorsed the note as accommodation indorser, to the person for whom it was intended, and when the note became due, D. took it up, and sued the makers thereon at law, and obtained judgment: *Held*, that the application came too late after judgment at law; that N. was concluded thereby from the defence.

On appeal from the vice-chancellor's court at Carrollton; Hon. Henry Dickinson, vice-chancellor.

Marcus Pierce states in his bill, that in April, 1837, he, with one Camp P. Newell, executed their joint note to the order of Washington Dorsey, the consideration of which was a preëxisting debt due from Dorsey and Newell to Ballard and Franklin by their joint note, and for which Ballard and Franklin had agreed to give longer time if the complainant would sign it as additional security; upon which the note was drawn as stated, and indorsed by Dorsey; that Dorsey made the application to him to sign the note as surety jointly with him, Dorsey for Newell, as Dorsey was formerly his sole surety; and that when he signed the note, he supposed that he and Dorsey were joint sureties of Newell; and had no idea that he was, by signing the note and Dorsey indorsing it, making himself liable to Dorsey. That Dorsey had taken the

note up and sued him on it, and obtained judgment in the Carrollton circuit court against him for the full amount of the note, principal and interest; that the process in the case was never served on him; that he had no knowledge of the pendency of the suit until the execution on the judgment issued against him; that the sheriff had returned the process "executed" generally, through mistake, under the supposition that Newell was the only defendant in the writ, as Newell's name was the only one indorsed on the back of the writ; that when he told the sheriff he had never been served with process, the sheriff looked at the writ and was satisfied that he had not been; and at a term of the Carroll court, subsequent to the judgment, had the service on the writ amended so as to read "executed on Camp P. Newell." That if he had been served with process he should have defended at law. The bill prayed for injunction, new trial at law, or other relief.

Dorsey answered the bill; admitted that he was surety for Newell to Ballard and Franklin, who threatened to sue unless further security was given; upon which he procured the complainant to sign as surety for Newell a note payable to himself, the complainant knowing at the time that he was to be liable only as indorser; that he had been compelled to pay the note; had sued upon it and obtained judgment at law; he did not know whether the writ was served on the complainant or not, but the sheriff had so returned it, and had afterwards amended his return upon which the circuit court had set aside his judgment, but the high court of errors and appeals had reinstated it. He denied all fraud.

Newell answered and admitted all the allegations in the bill.

Afterwards Dorsey, on leave of the court, filed an amended answer, by way of demurrer, to the bill, insisting on his judgment at law as a bar to the relief sought in equity.

The bill was filed in May, 1842; the answer of Dorsey, in June of the same year; the amended answer in September, 1843. At the June term, 1845, Pierce's death was suggested, and the suit revived in the name of Wellons, his administrator; and at the same term, the cause having been previously

Wellons v. Newell et al.

submitted for final hearing upon bill and answers at the December term, 1844, the vice-chancellor dismissed the bill and the administrator of Pierce appealed.

William Thompson, for appellant.

We contend that as Dorsey acknowledges he was bound with Camp P. Newell, in the note to Ballard and Franklin, if he was only security the proof would lie on him, and he has not made it.

But suppose in that note he was only security for Newell; still, as it relates to a new note, he would stand as principal to the new security, Marcus Pierce, and as the note was given in such a form as made Pierce liable to Dorsey, when it was, as Dorsey acknowledges, to recover a note on which he was previously liable, and Pierce could not defend at law, he would have an adequate and proper remedy in equity; and under the prayer for general relief the vice-chancellor should have enjoined perpetually the judgment which Dorsey unconscientiously got at law against Pierce.

Dorsey, it is true, says he was on the new note only to be liable as indorser. But then the situation of the parties, the preëxisting liability of Dorsey on the note he and Newell had given to Ballard and Franklin, and the law operating upon the transaction, are all against him; and if there was an express agreement to change the relative situation and liabilities of the parties, Dorsey was certainly bound to have proven it, for it is matter of avoidance set up in his answer. His saying he believes Pierce so understood it, will not answer.

Gibbs, for appellees.

The bill discloses no grounds whatever for equitable interference, and if it did there is no proof of any allegation in the bill; he comes into court, stating his ignorance of the different liabilities of the maker and indorser of a promissory note, and upon that ground only asking relief. No fact is alleged which, upon a new trial, would operate to discharge him from the whole or any part of the debt. Fonbl. Eq. 28; 2 Hen. & Mun.

139; 3 Johns. Ch. Rep. 280; 4 Johns. Ch. Rep. 92; 1 Sch. & Lefr. 201, 204; 6 Johns. Ch. Rep. 235.

Mr. Justice CLAYTON delivered the opinion of the court.

The bill states that the complainant, at the request of the defendant Dorsey, agreed to become bound with him as surety for one Camp P. Newell, to Ballard and Franklin. Newell and Dorsey were already bound for the debt to Ballard and Franklin, but it was proposed to give them an extension of time, if they would procure the liability of complainant. The complainant agreed to become thus bound. A note was presented to him, which he signed under the belief that Dorsey was to be bound jointly with him; — the fact, however, turned out to be, that the new note was drawn payable to Dorsey, and was by him indorsed to Ballard and Franklin. At maturity it was paid by Dorsey, and suit brought upon it in the circuit court of Carroll county, and judgment rendered against both Newell and Pierce. The bill states that this judgment as to the complainant Pierce, was rendered without notice and so is void; it prays for a new trial and for general relief.

The answer of Dorsey denies that he was to be bound upon the note jointly with complainant, but says it was understood by all, that he was to be indorser. States that at a term subsequent to the rendition of the judgment against Newell and Pierce, the circuit court, at the instance of Pierce, permitted the sheriff to amend his return of the writ, so as to show it had not been executed upon complainant, and then set the judgment aside as to him; states also that this judgment was taken by writ of error to the court of appeals and reversed. Answer denies all fraud.

The vice-chancellor dismissed the bill, and an appeal was taken to this court.

The great defect in this cause is the want of proof. There is no testimony upon any branch of the case. Whatever relief the party might be entitled to, if the bill were sustained by proof, it is not now possible to grant it, in the absence of all testimony. If it were made to appear, that the judgment was

rendered without notice, of course it would be regarded as void; and the party would be entitled to relief against it in equity. It may be matter of regret, if the facts exist, that they were not made to appear; but in the present attitude of the cause, this court cannot apply a remedy.

The other point made is concluded by the judgment at law. The decree must be affirmed and the bill dismissed, without prejudice, as there has been no trial upon the merits.

Decree affirmed.

WILLIAM A. LANG vs. J. D. FATHEREE et al.

It is not a good plea, in bar of an action on a note instituted in 1842, that on the 7th of May, 1839, the plaintiff had recovered a judgment against the defendants, on the same note sued on, which judgment was reversed on error at the January term, 1841, of the high court of errors and appeals, and that more than one year had elapsed after the reversal of the judgment before the plaintiff recommenced his suit.

The statute (H. & H. 571, § 101,) which provides that if in certain specified actions, judgment be given for the plaintiff, and afterwards reversed, or if he obtain a verdict, and the judgment is given against him on motion in arrest of the judgment, then the plaintiff may commence an action within one year, and not after, does not abridge the time of limitation, but enlarges the plaintiff's privilege, in case the bar has become complete, pending litigation; it therefore does not prevent a second suit, after reversal, even though it be not instituted within one year after reversal, if the general statute of limitations had not run against it.

Such provision, prohibiting the action after a year has elapsed from reversal, cannot be made the subject of a *plea*; the defendant can plead only the *general* statute; when the plaintiff may reply that he sued within six years, and his judgment was reversed, and he sued again within one year after the reversal.

Where a demurrer to a plea is overruled, it is erroneous to award judgment final for the defendants; it should be *respondeat ouster*.

In error from the circuit court of Clark county; Hon. Van Tromp Crawford, judge.

On the 3d of November, A. D. 1842, William A. Lang sued John D. Fatheree, John G. McRae, and Ransom D. McCann, in assumpsit, upon a note made by them, dated on the 1st day of January, 1838, and payable on the 1st day of January, 1839. The plaintiff discontinued his suit as to Fatheree, when the other defendants plead: 1. Non assumpsit. 2. That on the 7th day of May, 1839, in the circuit court of Jasper county, and state aforesaid, at the May term thereof, the said plaintiff re-

covered a judgment against the said defendants, in the above-stated case, upon the said promissory note declared on, in the said plaintiff's declaration; which judgment was taken to the high court of errors and appeals, by writ of error, and at the January term, A. D. 1841, of said court, the said judgment was then and there reversed by said high court, and the said defendants aver that more than one year hath elapsed since the reversal of said judgment by the said high court of errors and appeals and the commencement of said plaintiff's action, and this the said defendants are ready to verify, wherefore, &c. To the first plea issue was joined; but to the second, the plaintiff demurred, and the court below overruled the demurrer, and gave judgment final for the defendants, from which the plaintiff prosecuted this writ of error.

L. Lea, for plaintiff in error.

The plea is fatally defective, in form and substance. It attempts to set up matter of record, and yet is not in form to admit of the appropriate issue. On this ground the demurrer was well taken. But it should have been sustained, because the plea presented no substantial defence. The statute authorizing the institution of new suits within one year after the reversal of judgment, does not affect the general law on the subject of limitations, unless it be to enlarge the time. The suit was renewed, in this instance, within six years from the time the cause of action accrued; and it is immaterial whether the former judgment had been reversed more than a year previous to the renewal of the suit or not.

Robert B. Mayes, for defendant in error.

1. The plea is not defective in *form*. Issue might have been taken on the facts alleged, either as to the recovery and reversal of judgment, or the lapse of a year before the renewal of the action; both of which were indispensable to the vitality of the defence. And therefore, in pleading these facts, there is no duplicity, for all would be insufficient without either one, and all were necessary as inducements to the matter of law on which

the defendant relies. "No matter will operate to make a pleading double, that is pleaded only as necessary inducement to another allegation." Steph. Pl. 302, 303, which is stronger than the present case. And "no matters, however multifarious, will operate to make a pleading double, that together constitute but one connected proposition or entire point." Ibid. 303. It would be unjust to compel the defendant "to rely on the inducement only." True the plea sets up matter of record; but "if the plaintiff wished to deny it, such matter" might have been "traversed separately." Ibid. 204, 306.

2. Nor is the plea defective in *substance*. The language of the statute is positive. "If in any of the said actions specified in any of the preceding sections of this act, judgment be given for the plaintiff, and the same be reversed by writ of error, or if a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, then the said plaintiff, his or her heirs, executors or administrators, as the case shall require, may commence a new action within one year after such judgment reversed, or given against the plaintiff, *and not after*." H. & H. 571, § 101.

If this enactment were not intended to confine such renewals of actions to one year, in all circumstances, it should have specified that the plaintiff "may commence a new action within one year after such judgment reversed, &c. and not after," unless such year expire within six years from the time when the action accrued. But no such exception is made.

The object of this law is to put a speedy end to litigation; that if the plaintiff have rights he may assert them at once and not hold them over the defendant. Therefore, he loses his right of action, if he do not use it within six years; and if, having brought his action and obtained judgment, such judgment be reversed by the supreme court, which affords a presumption against his right, a further restriction is put upon him. Where there is no ambiguity, there can be no construction.

Should the six years expire during the litigation, and the plaintiff be defeated because of some formal error, he has another year allowed him by this law, during which he may

Lang v. Fatheree et al.

amend his course. But if, as in the present case, the action be instituted, decided, and reversed, within the six years, the law is yet definite that he "may commence a new action within one year after such judgment reversed, and *not after*." So the defendant is not kept in continual apprehension, nor subject to an action, when length of time may have deprived him of many means of defence.

By instituting his suit, the plaintiff takes his case out of the general statute of limitations; by the reversal of judgment, it falls under a special statute of limitation. By the general statute, suit may be brought "within six years next after the cause of action shall have accrued, and not after." The suit was instituted within the specified time, and thus the plaintiff avoided the prohibitory part of the act. But the reversal of the plaintiff's judgment, threw the case within the special statute, by which a new action may be commenced "within one year after such judgment reversed, and not after." The force of these words is here obviously the same as in the general law, and it would be as reasonable to bring an action seven years after the cause accrued, as to bring a new action thirteen months after reversal of judgment. The act says, emphatically, that the plaintiff, &c. "may commence a new action within one year after such judgment reversed, and not after."

Mr. Chief Justice. **SHARKEY** delivered the opinion of the court.

This action was commenced by Lang, on a promissory note made by the defendants. The action was dismissed as to Fatheree, and the other defendants plead non assumpsit, and a special plea of limitation, to wit: that on the 7th of May, 1839, the plaintiff had recovered a judgment against defendants on the same note now sued on, which judgment was reversed on error at the January term, 1841, of the high court of errors and appeals, and that more than one year had elapsed after the reversal of the judgment, before the plaintiff recommenced his suit. To this plea the plaintiff demurred, which was overruled by the court. The note sued on was payable on the 1st of January, 1839, and this action was commenced on the 3d of November, 1842.

It is insisted that the plea was good, because the statute is general in its provisions, and applies in all cases where a new suit is brought after judgment reversed. The provision relied on is sec. 101, H. & H. Dig. 571. It constitutes part of the general statute of limitations, and provides that if in any of the actions specified in the preceding sections, judgment be given for the plaintiff, and afterwards reversed, or if he obtain a verdict, and the judgment is given against him on motion in arrest of the judgment, then the plaintiff may commence an action within one year, and not after. The English statute of 21 James, 1, c. 16, contains a provision, in the very same language, used in ours, and it is not construed to abridge the time of limitation, but as enlarging the plaintiff's privilege, in case the bar has become complete, pending litigation, and this was doubtless the object of our statute. It was not intended to establish a different rule for cases in which no limitation had run, merely because suit had been brought; but it is a saving to the plaintiff from the general provisions of the statute, in case he should prove unsuccessful in his first suit. This provision is not the subject of a plea; being a saving or exception, it must be replied. The defendant can only plead the general limitation, and the plaintiff may answer it by replying that he sued within six years, and his judgment was reversed, and that he has sued within one year after the reversal. 2 Saund. R. 63, (note 6.) But this judgment is erroneous for another reason. It was final for defendants on the demurrer to the plea, when it should have been *respondeat ouster*.

Judgment reversed, and cause remanded.

• WILLIAM S. SCOTT et al. vs. THOMAS FREELAND.

3 Whenever a trustee sells the trust estate and becomes himself the purchaser, the sale may be set aside at the option of the *cestui que trust*, as a matter of course; without regard to the fairness or unfairness of the sale; in setting the sale aside, however, the court will order the property to be resold; and if it should not bring a higher price on the second sale, then the original sale is confirmed, or the court, in its discretion, may set aside the sale entirely if necessary, and order the purchase-money to be refunded. The same rule applies to a purchase by a guardian of his ward's property.

2 Where a trustee has become the purchaser of his *cestui que trust's* property, if the *cestui que trust* do not in a reasonable time take steps, after he comes to a knowledge of the sale, or, if he be a minor, after his disability is removed, to set the sale aside, his assent to the purchase will be implied. Where, therefore, W. S. died, leaving five children, W. became guardian for two of them, B. for two, and F. for one, and the guardians applied for and obtained an order of sale of the realty of their wards, and F. became the purchaser; at the time of sale the oldest of the wards was twenty years old, the youngest about twelve; ten years after the sale, the wards exhibited their bill against F. to have the sale set aside, because F., their guardian, was the purchaser of the property: *Held*, that the laches of the two oldest children, and their delay and neglect in not applying earlier to have the sale set aside, implied an affirmation of the sale by them, and precluded them from the relief they sought.

2 The assent of the *cestui que trust* to the purchase of the trust property by the trustee, in order to ratify the sale need not be express, it is often implied from circumstances, one of the strongest of which is a failure to take immediate steps, on the *cestui que trust's* obtaining a knowledge of the sale, and being freed from disability, to have the sale set aside.

Where property of a ward has been purchased by his guardian, and the ward, on arriving at age, receives the value of the property sold, with a full knowledge of what had been done by his guardian, it is an affirmation of the purchase of the trust property by the guardian, and vests the property in him; though the reception by the ward of his distributive share, on his arrival at age, ought not to be construed too strongly against him, and ought not to operate to his prejudice when it is obvious that he acted without due precaution.

ON appeal from the superior court of chancery ; Hon. John A. Quitman, special chancellor.

The bill in this case was filed by William S. Scott, Thomas Scott, and Robert Scott, and states that William Scott, of Claiborne county, died seized and possessed of a tract of land, containing seven hundred and twelve acres, in that county. That the complainants are his heirs.

That on the 20th January, 1829, the legislature passed a law authorizing the defendants, Jeremiah Watson, William Briscoe, and Thomas Freeland, who were then guardians of complainants, to sell said tract of land, at auction on a credit of one, two, three and four years, on conditions specified in the act, which it is not necessary to set out. That on the 9th February, 1829, the orphan's court of Claiborne county ordered the sale of the same land on the same terms. That said defendants did offer the land for sale on the 19th December, 1829, and Thomas Freeland bid therefor twelve dollars per acre, including the right of dower ; and the defendants executed a deed to him.

That Freeland was at that time guardian of William S. Scott, and caused it to be reported that he would purchase the land, and consequently there were but few bidders at the sale, and the land sold for less than it was worth.

That persons called to see the land before the sale, but Freeland would not show it. And he used every exertion to cause the land to sell as low as possible. That shortly after the death of William Scott, letters of administration were granted to Freeland and Watson, and Freeland took possession of the real and personal estate, and managed them. That the personal estate was ample to pay the debts and there was no necessity to sell the land. And if Freeland had not desired to purchase he would not have procured the authority. That he took possession of the land and continued to hold adversely to complainants from the sale, until the filing the bill, and received the rents, issues and profits ; and cultivated six hundred acres of land, worth fifty dollars per acre.

That complainants were young when the sale was made, and knew very little of the transaction. And when they set-

ted with their guardians, did not inquire from what source the funds arose which were paid to them; but they have never confirmed the sale; and contend it was in fraud of their rights. They pray that the sale may be set aside.

The answer of Freeland admits that William Scott died, seized of the land, that complainants are his heirs, that he was an administrator, and is guardian, as stated. Admits the act of the legislature and order of the court to sell the real estate, which he deemed for the best interest of the heirs, the estate being in debt and a sale of something inevitable; admits the purchase by him, and avers he gave a full price, which was so considered at the time, which induced him to take the deed direct to himself; he denies that many persons called on him to see the land. Also denies that he used exertions to cause the land to sell as low as possible. States that he resigned the guardianship of William Scott, and William Briscoe became his guardian. States he has long since paid for the land, and presumes it has been appropriated to paying the debts of deceased, that is, in remunerating the guardians for advances, and in distribution among those entitled.

That he intended to account for the personal estate, and believes he did, and promises to produce a copy of the record of the probate court showing it, which account also embraces the proceeds of the land and the negroes. That he has accounted for all he ever received of the estate.

That complainants, since they became of age and when they understood what had been done in reference to the estate, received their distributive portions of the personal estate and the proceeds of the land. States the youngest was fifteen, and the eldest twenty years old at the time of the sale, that more than nine years have elapsed since he held adversely. That he has a relinquishment of dower from Scott's widow; that he had only one hundred and fifty acres in cultivation, worth three or four dollars per acre rent; he admits that the personal estate was sufficient to pay the debts; but insists it was for the best interest of the heirs to sell the land; that complainants accepted the proceeds with such knowledge of the

facts and with that belief, after they came of age. That they were tempted to such a recovery of the land by its rise in value, and insists that they are concluded by their conduct.

The bill was taken for confessed against Briscoe and Watson.

Josiah Cox proved that the land sold was now in possession of Freeland, except forty acres, sold to one Valentine; that there were about one hundred and seventy acres in cultivation, when bought by Freeland, worth four dollars per acre rent. That he was not at the sale, but he understood Freeland was expected to be the purchaser.

S. K. Montgomery proved that in his opinion there were two hundred acres cleared when Scott died. Was present the first time the land was offered for sale; there was but one bidder besides Freeland; the sale was postponed, because enough had not been bid for it; he thinks the rent was worth six hundred dollars per annum; that Freeland admitted that he had cried his own bids, and stated he would like to become the purchaser. That all the complainants were present at the first sale; he saw nothing unfair, and does not believe Briscoe and Watson would permit any sale injurious to the interest of their wards.

W. Briscoe proved that he was present at the sale. Freeland was the highest bidder at twelve dollars per acre, there were seven hundred and twelve acres in the tract; the money was to be paid or adjusted in such manner as should be satisfactory to those concerned. At the time of the sale, Robert Scott was nineteen or twenty years of age, Agnes sixteen, William S. fifteen, Thomas B. twelve, Elizabeth M. thirteen or fourteen; but they were of age when he settled with them as guardian; and he subsequently became guardian of and settled with William S. Scott.

The estate being in debt over \$6000, he thought it for the interest of the heirs to sell the land in preference to the negroes; and being interested to the extent of the dower, he agreed to let the whole be sold and take one-sixth of the proceeds of sale and pay one-sixth of the debts; he did not think the land brought a high price, or as much as such land was estimated at in the neighborhood.

The sale was open and fair; there was no combination; he was directly interested in one-sixth by marriage; and also as guardian; that there were two hundred acres in cultivation worth four dollars per acre for rent; he describes the improvements and thinks they were worth \$1500; all have been removed by Freeland; he thinks the rent of the land for pasture, worth from one hundred and fifty to two hundred dollars per annum. There was no effort to prevent bidders, there were very few at the sale; he heard it frequently mentioned that Freeland wanted the land and would probably purchase, but could not say that prevented bidders attending; that it was generally known or believed that Freeland wanted the land.

William Young states that he was not at the sale; he heard that the land sold for twelve dollars per acre, which he considered its value, and that was the opinion of the neighborhood.

James Crane, proved that he was at the sale. The land was struck off to S. C. Daniel, at twelve dollars per acre. The complainants were all present at the sale, the oldest was about twenty, the other two younger; he heard of no dissatisfaction; he was one of the commissioners to set apart dower, and divide the land, and reported that it could not be divided to the mutual advantage of the heirs. He then thought and still thinks the land sold for a fair price. The sale was fair and public, many persons present; he neither saw or heard of any combination, and thinks there were one hundred and twenty acres cleared land, and three dollars per acre rent would be a fair price.

Jeremiah Watson proved that he was present at the sale. The land was struck off to Smith C. Daniel. After the sale, Freeland informed him that he was the purchaser. It was sold for \$8544:

The money coming to him as guardian of two of the heirs was paid; and has been informed by W. Briscoe and William Scott, that the balance of the money was promptly paid.

Robert was about twenty, Agnes seventeen, William fifteen, and Thomas ten. Knows that all the heirs were acquainted with the manner and circumstances under which the sale was made except Thomas, and he may have been. Robert received his

Scott et al. v. Freeland.

portion; Alexander Ross, who married Agnes, received her portion.

The estate was in debt \$6661 91, and witness and Briscoe were of opinion it would be better to sell the land than the negroes. Freeland, previous to any action regarding the sale, proposed to him and Briscoe that each of the guardians should advance his proportion of the debts, and obviate the necessity of a sale, which they declined. Freeland paid the whole debt, and deponent gave a note to Freeland for one third of the debt, so as to relieve the estate from debt before a sale. He believes the sale was fair and open in every respect; not an attempt or suspicion of an attempt, to make the land sell for less than its value; and that all parties concerned were satisfied with it.

The late chancellor Buckner, being a near relative of M. Freeland the defendant, did not sit at the trial of the case; and the Hon. John A. Quitman, being selected by the parties to preside in the trial, having had the cause submitted to him for final hearing, on the pleadings and proofs decreed that the bill be dismissed; and from this decree, the complainants appealed.

Montgomery and Boyd, for appellants.

There are only two points involved in this case.

1. Can a trustee become a purchaser from his co-trustees under any circumstances?

2. Have the complainants, by their conduct, ratified and confirmed the sale?

As to the first point there can be but little difficulty. The authorities all speak the same language; from which it is clear a trustee cannot purchase, at his own sale, or at a sale made by co-trustees. And it is of no consequence that the sale was fair, open and public, and that the price was the full value of the property. The court, as a matter of course, will, on the application of those interested, set the sale aside, and order a resale, the price bid by the trustee to stand as the minimum limit. 2 Johns. Ch. R. 252.

The other point stands wholly upon the testimony. For we admit that if the complainants, with a full knowledge of all

Scott et al. v. Freeland.

the circumstances, received the price of the land without complaint, it is a ratification.

On the second point, the counsel for appellants carefully reviewed and examined all the evidence in the record, and contended that it did not establish a confirmation or ratification by the heirs of the sale by their guardians; and they cited the following authorities. 4 D. & R. 543; 2 B. & C. 824; 5 Esp. 102; 4 Dessaus. 60.

George S. Yerger, for appellee.

1. The evidence makes out a fair sale, no fraud, and the property went for its full value, or about it, according to the strength of the testimony. The order of the probate court fully authorized the sale, whether the act of the legislature did or not. The order of the probate court is to be presumed valid; it is not charged that due notice was not given, nor is the record filed. The court therefore is bound to presume the judgment correct. *Smith v. Dewson*, 2 S. & M.

2. Mr. Freeland was guardian for one of the minors. Mr. Watson and Mr. Briscoe were guardians for the other. No legal title was vested in them; they merely executed an authority or power conferred by the court, or the statute. One of the guardians became the purchaser. This case then involves the principle, whether the purchase of a guardian, is allowed in such case. And if it is not, whether, being merely voidable, the *cestui que trusts* should not apply in a reasonable time after the sale, or after age, to set it aside.

Upon the first point it may be admitted that the law discountsenances such sales, in general; and, if an application is made to set them aside in reasonable time, or before settlement, or election to take the proceeds, they will be set aside.

But if the minor, after full age, ratifies or affirms it, or acquiesces in it; or if he does not apply to set it aside in reasonable time, a court of equity will permit the sale to stand. See 2 Kent's R. 231; Meigs's R. 175; 8 Paige's R. 89; 2 Story's Eq. 1210, 1211; 3 Yerg. R. 80. As to what circumstances will constitute an election by the party, after full age, 2 Story's Eq. sec. 1097, 1098.

There is no question, as a general rule, that the *cestui que trust* has a right to set aside the sale, if he chooses, when the trustee is the purchaser. 2 Johns. Ch. R. 260, 261, and authorities cited.

But it is a right of election merely; they may elect to affirm the sale, or to set it aside. 10 Ves. 385; 2 Johns. Ch. Cases, 259, 261.

The authorities are, wherever a trustee purchases at his own sale, it may be set aside, without showing any fraud. But it can only be set aside at the option or election of the *cestui que trust*. *Campbell v. Walker*, 5 Vesey, 678, 680; *Ex parte Lacy*, 6 Ibid. 625; *Ex parte Bennett*, 10 Ibid. 381, 385, 386; 5 Madd. R. 9.

The rule is, that the *cestui que trust* has a right to set aside the sale, fraud or no fraud, if he chooses to say, in any reasonable time, he is dissatisfied with it. 2 Johns. Ch. 261, and cases cited.

Lord Eldon says, it is in the choice of the *cestui que trust*, whether he will or not, &c. &c. Cited 2 Johns. Ch. R. 263.

Indeed, it would be prostituting the rule to dishonest purposes to permit the *cestui que trust*, at any distance of time, to speculate on the property, and set it aside or not, after he had elected to consider it valid.

The sale was made in 1829. Thomas Scott, the youngest of the complainants, was the ward of William Briscoe. After the sale Mr. Freeland gave up the guardianship of his ward, and Briscoe became his guardian. Freeland paid the proceeds of his purchase, as is proved. The sale was made to pay upwards of six thousand dollars, due from the estate, or the wards. This bill is filed to set aside the sale in 1839, ten years after; and four years after Thomas Scott, the youngest, came of age. I say four years, because, although one witness says he was about ten at the time of sale, and others do not know his age, yet Briscoe, his guardian, who knew better than any other his age, says he was fifteen years old at the time of the sale. Briscoe proves further, as does some of the other witnesses, that he settled fully with all complainants, after they were of age,

and they received their shares of the proceeds of the land sold to Freeland. They were all present at the sale.

If no act had been done, their laying by four years, without applying to set aside the sale, would have prevented equity from hearing them. But they settle after full age, elect to receive the proceeds, lay by for four years, and when land rises a little, come into equity to set it aside. It will not do.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This bill was filed by the complainants to set aside a sale of real estate, made under the following circumstances. William Scott, the ancestor of complainants, died in Claiborne county, leaving a tract of land, and also some negroes, which descended to his five children, two of whom have since died. Jeremiah Watson was appointed guardian for two of the children; William Bristoe for two, and Thomas Freeland for one. The oldest was near twenty years of age, and the youngest near fifteen. In January, 1829, the legislature passed a law authorizing the guardians to sell the land to pay the debts of the estate, in preference to the personal property. An order was accordingly obtained from the probate court for that purpose, and the land was sold, and Thomas Freeland became the purchaser. There is no objection to the regularity of the sale, nor is there any ingredient of fraud in the transaction. On the contrary the land sold for its full value, and everything was conducted fairly, and for the best interests of the wards, and the money properly applied to its legitimate purposes. Indeed, there is much in the case commendatory of the conduct of the guardians, in their efforts to relieve the estate from embarrassment, and to promote the best interests of their wards. Under this state of facts there can be but two questions; first, was the sale voidable; and second, are the complainants in a condition to set it aside; or, in other words, have they waived their right since they became of age, and thereby ratified the sale.

In regard to the first point, there is no dispute between counsel as to the law; it is consequently unnecessary to enter into a minute investigation of the subject; but as the question is for the first time directly presented, divested of all extraneous circumstances, it may not be amiss to state what is believed to be the true rule in relation to purchases by trustees of the trust estate. An inclination has been manifested by some of the English judges, and perhaps by some of the courts in this country, to look into the transaction when a trustee has purchased the trust property, and to make its validity rest upon its fairness. The decided weight of authority, however, is the other way; the sale may be set aside at the option of the *cestui que trust*, as a matter of course. It will be sufficient to refer to the decision of Chancellor Kent, in *Davous v. Fanning*, 2 Johns. Ch. R. 252, in which that great jurist entered into a lengthy investigation of the question, by a review of all the authorities. He lays down the rule emphatically, and without qualification, "that if a trustee, acting for others, sells an estate, and becomes himself interested in the purchase, the *cestui que trust* is entitled to come here, as of course, and set aside that purchase, and have the property reëxposed to sale." The same doctrine has been recently announced by the supreme court of the United States, in the case of *Michaul v. Girord*, 4 How. S. C. R. 503. This is the safest rule; it removes temptation from the trustee. If he is permitted, under any circumstances, to become a purchaser of the trust estate, the deepest frauds may be cloaked under the guise of fairness, and exclude the possibility of proof. In granting relief, however, the court will order the property to be resold, and if it should not bring a higher price on the second sale, then the original sale is confirmed; or the court in its discretion may set aside the sale entirely, if necessary, and order the purchase-money to be refunded. As this sale then was clearly such a one as the heirs could have set aside on coming of age, it remains to inquire whether they have waived their right, and elected to consider it valid.

This bill was filed on the 19th of October, 1839, ten years after the sale was made. At the time of the sale Robert, the

oldest of the children, was nineteen or twenty years old; William was about fifteen, and Thomas, who was the youngest, was about twelve, according to the testimony of Briscoe, who was the guardian of Thomas. At the time this suit was instituted the oldest of the complainants must have been near thirty years of age, and the youngest twenty-two. After they became of age, their guardians settled with them, and paid to each his share of his father's estate. The heirs were present at the sale, and have been fully cognizant of the fact ever since. There has been no express ratification of the sale, but the foregoing circumstances are relied on as showing the assent of the heirs to the purchase of Freeland. It is not necessary that there should be an express assent to the purchase, it is often implied from circumstances, one of the strongest of which is a failure to take immediate steps, on coming of age, to have the sale set aside, provided the party knew of it. The *cestui que trust* may elect to treat the sale as valid if he will, and such election will be implied from any unreasonable delay in taking steps to set it aside. If he should desire to have it set aside, the law requires that at least a reasonable degree of vigilance should be adopted. To lay down any precise rule on this subject is impossible, in the nature of things; each case must be governed by its own peculiar circumstances. Supposing these complainants to have been adults at the time of sale, the lapse of time between that and the filing of the bill would undoubtedly be regarded as a confirmation. In regard to the contract of an infant, which is voidable, Chancellor Kent says, a confirmation may be justly inferred against him after he has been of age for a reasonable time, either from his positive acts in favor of the contract, or from his tacit assent under circumstances not to excuse his silence. 2 Kent's Com. 238. With regard to the oldest of the complainants the delay has been so great as to imply an affirmance. It was his duty to have manifested his dissent at an earlier day, and so with the next oldest. It is not like the case of a positive bar from a statute of limitations which would only commence to run when the youngest became of age. It was competent for the elder heirs to have filed their

bill before the youngest became of age, and their neglect to do so must operate against their pretensions. But even as to the youngest, there was a want of vigilance, which, under the circumstances, must operate to his prejudice.

But, in addition to the length of time which intervened from the majority of the parties to the filing of the bill, there is another circumstance entitled to even more weight. After arriving at full age they all received from their guardian the product of this sale, either in money, or, which is the same thing, in property which had been protected and saved by the money arising from the sale. The proof is, that the estate was in debt about six thousand dollars; the land sold for over eight thousand; and by the sale of the land the negroes were saved. And they received their distributive share with a full knowledge of what had been done; and at a time when they were capable of judging whether the sale had been beneficial to them or not. Such settlements are usually regarded as an affirmance of the purchase of trust property by the guardian. This must be the result. If, after coming of age, they agreed to receive, and did receive the value of the property, instead of the property itself, it was a valid and binding contract, assuming that they did so with a full knowledge of their rights. In *Caplinger v. Stokes*, Meigs's R. 175, a similar settlement between a guardian and his ward, made shortly after the latter became of age, was held to vest the trust property in the guardian. This, in the language of Chancellor Kent, is a positive act in favor of the contract. It is true that the reception of a distributive share by one who has just become of age, ought not to be construed too strongly against him. It is to be viewed with great allowance, and ought not to operate to his prejudice when it is obvious that he acted without due precaution, if immediate steps are taken to correct the matter. But when parties after such a settlement have remained passive so long, it is hard to resist the conclusion of acquiescence. As to the two oldest of these complainants, they are clearly estopped by the delay as well as by their contract. The contract they made when they became of age

Scott et al. v. Freeland.

was a valid one, and it cannot be set aside unless the heir can make some showing that his assent to it was procured by mistake of his rights, or by the fraud or deception of the opposite party.

The decree must be affirmed.

JAMES S. WEEMS v. MAHALA MCCAUGHAN.

The covenants raised by land, from the use of particular words in the deed, are only intended to be operative when the parties themselves have omitted to insert covenants; where the grantor does insert covenants, they constitute the extent of his liability. A deed, therefore, which contains the words *grant, bargain, and sell*, (which words the statute gives a certain construction to,) but concludes with an express covenant of warranty, imposes no further liability on the grantor than is contained in his express covenant.

In error from the circuit court of Smith county; Hon. Thomas A. Willis, judge.

Mahala McCaughan, administrator of James L. McCaughan, deceased, sued James S. Weems in covenant in these words: "For that whereas the said defendant, in the lifetime of the said James L. McCaughan, together with Caroline M. Weems, wife of said defendant, on, &c. at, &c. in the county aforesaid, by a certain indenture then and there made between said defendant and his wife of the first part, and the said James L. McCaughan of the other part, (of which said indenture profert was then made) by which said indenture it was witnessed, that in consideration of the sum of one thousand dollars to the said James S. Weems and wife paid, the said James S. Weems and wife did grant, bargain, sell, and convey unto the said James L. McCaughan, deceased, and his heirs and assigns, the following described land: (the description followed.) To have and to hold the same unto the said James L. McCaughan, his heirs and assigns forever. And the said plaintiff avers that neither the said James S. Weems nor his wife were seised of an indefeasible estate in fee simple freed from incumbrances done and suffered by the said James S. Weems or the said Caroline M. Weems, in and to said above-described lands, at the time of the sealing and delivery of said mentioned indenture, to wit, &c.; to the damage, &c.

Weems v. McCaughan.

"And whereas, also, said defendant in the lifetime of said James L. McCaughan, to wit, &c. made his certain deed in writing, sealed with his seal, and to the court now here shown, which said deed is in the words following, to wit: 'This indenture made and entered into this 24th day of April, 1839, between James S. Weems and Caroline, his wife, of the first part, and James L. McCaughan of the other part, both parties of Smith county, state of Mississippi, witnesseth, that the said James S. Weems and Caroline his wife, for and in consideration of one thousand dollars to them in hand paid, the receipt of which is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain and sell, and convey unto the said James L. McCaughan, his heirs and assigns, the following described land: (here follows a description thereof.) To have and to hold with all and singular the hereditaments and appurtenances to him, the said James L. McCaughan, his heirs and assigns forever from us, our heirs and assigns. And we, the said James S. Weems, and Caroline his wife, do hereby, and will forever warrant and defend the right and title of the above-conveyed land to him, the said James L. McCaughan, his heirs and assigns, and against the title, claim, or demand of all and every person whomsoever claiming, or to claim the same, in any way whatever, &c. And said plaintiff avers, that at the time of sealing the said deed, to wit, &c. the said James S. Weems was not seised of an estate in fee simple in and to the lands in said deed mentioned, to the damage, &c., concluding in the ordinary way.

The defendant below demurred, and the court overruled his demurrer; he then plead, but it is not deemed necessary to take further notice of the proceedings below. The court rendered judgment against Weems, and he prosecuted this writ of error.

W. P. Harris, for plaintiff in error.

1. Admitting the right of the plaintiff below to sue upon the covenants declared on, she could not sustain the action without averring and proving a breach in the lifetime of the intestate, from which actual damage resulted. In the case of *Kingdon v. Nottle*, 1 Maule & Selwyn, 355, an executor brought an action

on the covenant of the grantor, that he was seised in fee of the estate conveyed, without alleging actual damage to the intestate, and the court held that the action could not be sustained. The principle is to be found in 1 Chit. Pl. 22, and is also recognized in the case of *King v. Jones*, 5 Taunt. 418. These cases decide that such a covenant descends with the land to the heir.

It is true, that the covenant of seisin at common law did not require eviction to entitle the grantee to bring his action. But although the declaration is founded upon such a covenant, it is not contained in the deed recited, either by implication or express words.

Since the act How. & Hutch. Dig. 349, sec. 32, no covenants can be raised by implication from the words of a deed except such as are implied in the words *grant*, *bargain*, and *sell*. Our statute is an exact copy of the act of Pennsylvania, passed in 1715, which had received a judicial interpretation before our statute was enacted, and such was the effect given to it.

The language of the statute has been held to mean only that the grantor has done no act to incumber or defeat the estate granted, 2 Bin. 95; and this construction received the sanction of Chancellor Kent. 4 Kent's Com. 473. In assigning a breach under this construction of the act, it is not sufficient to say that the grantor "was not seised of an indefeasible estate in fee, free from incumbrances," or "that he was not seised of an estate in fee simple." It should be averred that he had created an incumbrance, or that he had done some act by which the estate might be defeated. The fact, that the grantor was not seised of an indefeasible estate in fee, or that an incumbrance existed, does not entitle the grantee to sue. In order to entitle him to his action, the act which rendered the estate defeasible must have been done, or the incumbrance created by the grantor himself. And if this was necessary to entitle the plaintiff to his action, the omission to aver it in her declaration is fatal.

2. In another view of this case, the declaration is bad, the deed is made part of the declaration, and contains an express covenant of general warranty. And it is a settled principle, that covenants raised by the law yield to the covenants made

Weems v. McCaughan.

by the parties. In a case similar in many respects to the present, *Vanderkarr v. Vanderkarr*, 11 Johns. R. 122, the court held that where the deed contained express covenants of general warranty of title, the party must sue upon them and allege and prove eviction. *Brown v. Smith*, 5 How. 387, is to the same effect; and it is upon the principle that when the parties themselves have expressed the extent to which they intend to be bound, the law will not extend or vary their responsibility. 4 Cruise Dig. 381; sec. 19 and 394.

Heyfron, for defendant in error.

Our statute law H. & H. 349, sect. 32, makes the words *grant, bargain, and sell*, in a deed of conveyance, amount to an express covenant that the grantor was seised of an indefeasible estate in fee simple, free from incumbrances done or suffered by him, &c., and that the grantee, or his administrator, may assign breaches as if such covenants were expressly inserted, &c. The legal effect of the deed declared upon, is precisely the same as if said covenant of seisin was expressly inserted therein, and set out on the record. The first objection, that the administratrix cannot assign breaches on a covenant of seisin, is, we think, not true even by the common law. It is a personal covenant, and the damages upon its breach go to the personal representative. 4 Kent's Com. 470. But the statute authorizes the assignment.

In answer to the last objection to the declaration, we say it is not necessary to aver or prove an eviction on breach of covenant of seisin. Such a covenant is broken when the deed is executed, if the grantor was not then seised. To require grantee to enter when grantor was not seised so that eviction might take place, would be requiring him to commit trespass before he could recover. See *Pollard & Puckett v. Dwight et al.* 4 Cranch, 105.

2. It is contended by plaintiff's counsel, that the statute H. & H. 349, sect. 32, only means, that grantor has done no act to incumber or defeat the estate granted; and to justify the assertion, he quotes 2 Binney, 95, and 4 Kent's Com. 473.

Chancellor Kent gives no opinion of his own on such statutes, but merely refers to the case in 2 Binney, and according to that case we think it means that the grantor was seised of an estate in fee, free from any incumbrance by him created; it does not amount to a covenant against all incumbrances. A man may be seised of an indefeasible estate in fee, which may be incumbered; now if such an incumbrance is not done or suffered by the grantor, the covenant does not extend to it. But it is admitted by all, that if the grantor uses the words, *grant, bargain and sell* in the deed, and the estate is at all, or in the very slightest manner incumbered by any act of his, there is a breach of covenant. Can it then be contended, that the fact of his not being seised does not amount to a breach? Would the legislature have been so precise about the most trifling incumbrance, and not regard title or seisin? In the first count of the declaration, the breach is alleged in the precise negative of the affirmative language of the statute.

According to 2 Nott & McCord, 186, the second count is good by the common law; it contains a similar covenant, and avers as a breach, that Weems was not seised in fee. It was not necessary according to the above case to aver an eviction.

We also think that the following words in the deed, set out in the second count, amount to a covenant of seisin by the common law: "doth *hereby* and will forever warrant and defend the right and *title*" "against the *title, claim or demand* of all and every person whomsoever, claiming or to claim the same in *any way whatever*." He does not warrant the premises or the land, but the *title*, which always means a good legal title.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The defendant in error instituted this action in the court below on the covenants in a deed of conveyance. The questions arise out of the defendant's demurrer to the declaration, and the plaintiff's demurrer to the plea of the defendant which was filed when the demurrer was overruled.

The declaration seems to be founded on the breach of a covenant of seisin. The deed contains no such special covenant,

Weems v. McCaughan.

but the implied covenant, resulting from the use of the words "*grant, bargain, sell*," is relied on. The deed contains an express warranty of title. The declaration contains two counts. In the first the covenant is laid as having arisen from the words *grant, bargain, sell*; the breach is, that the grantor was not seised, and it concludes to the damage of the plaintiff as administratrix. The second count sets out the deed, assigns the same breach, and concludes in the same way.

If the grantor had no title, as is averred, then the covenant was broken as soon as made, and the right of action accrued of course to McCaughan in his lifetime.

Without noticing the several grounds taken by the plaintiff in error, the case may rest upon one, as altogether sufficient to reverse the judgment. The deed contains an express covenant of warranty, which does away any implied covenant. The covenants raised by law from the use of particular words in the deed, are only intended to be operative when the parties themselves have omitted to insert covenants. But when the party declares how far he will be bound to warrant, that is the extent of his covenant. The law will not hold him bound beyond it. Cruise on Real Property, title Deed, 449. *Vanderkarr v. Vanderkarr*, 11 Johns. 122. Although the defendant did not set out the deed in the demurrer, yet it was set out at length in the second count, and this is sufficient, inasmuch as it is manifest that the two counts are on the same instrument. The demurrer to the declaration ought therefore to have been sustained, for which error the judgment must be reversed, and the cause remanded.

15 428
77 400

HENRY F. CARRADINE vs. SAMUEL COLLINS.

As between donor and donee the gift of a chattel is incomplete without delivery or some act equivalent to delivery; if at the time the thing given be susceptible of transmission, *actual* delivery is not necessary; it may be constructive or symbolical.

It seems that the delivery of a deed, or having it recorded, the declarations of the donor, the situation of the parties, are circumstances which the jury may take into consideration on the question as to whether there was a delivery from the donor to the donee; but without the jury are satisfied that there was a delivery, they cannot find that it was a gift.

In error, from the Yazoo circuit court; Hon. Morgan L. Fitch, judge.

Samuel Collins, a minor, by William Battaile his guardian, brought an action of replevin against Henry F. Carradine, under the act of 1842, for two slaves. On the plea of not guilty, plead by Carradine, a trial was had, and verdict was rendered in favor of Collins. Bills of exception were sealed on the trial, from which it appeared that Carradine was a half brother of Collins, both being children of the same mother; that Collins and his three or four sisters lived with Carradine several years after the death of their mother, and that said slaves had ever since remained in the possession of Carradine.

Lewis A. Stevens, a witness called by Collins, proved that he had lived with Carradine as his overseer, and had heard Carradine say that several negroes, naming them, including the two sued for, belonged to Collins and his sisters. Samuel Boylan, a witness for Collins, also proved that he had had frequent conversations with Carradine, and that he always understood from Carradine that the negroes were left to Collins and his sisters by their mother, who was also the mother of Carradine. Collins also gave in evidence to the jury, a transcript of

the record of the district court of the United States for the southern district of Mississippi, showing the schedule of debts and property filed by Carradine in the district court, on his application to be discharged as a bankrupt. The schedule did not contain the negroes in controversy; and also, that on the 7th of November, 1842, Carradine was duly declared a bankrupt, and discharged from his debts.

On the trial Carradine gave in evidence a deed dated 4th May, 1831, from himself, conveying certain slaves therein named to Collins and his sisters, and in it he conveys the slaves in controversy to Collins, and in the *habendum* of the deed conveys the slaves forever, and adds the words, "under my own proper guardianship and protection." The counsel of Carradine asked the court to give the following instructions:

1. That if they believed, from the evidence, that the negroes in controversy have always been in possession of defendant, H. F. Carradine, the donor, and if they further believe, from the evidence, that when Carradine made the deed, he reserved the use of the negroes until he chose to perfect the gift by delivery, then they must find for the defendant.

2. That if they believe, from the evidence, that it was the intention of the donor Carradine, at the time of making the deed, to resume the management and control of the negroes until he perfected the gift by delivery, then the plaintiffs title is not perfected, and they will find for defendant.

3. That if the jury believe, from the evidence, that the reservation of guardianship and control is consistent with the deed, then the defendant has a right to the use and control of the negroes in controversy during life, and the jury will find for defendant.

4. That if the jury believe, from the evidence, that the gift of the slaves has been unaccompanied by delivery of the possession to the donee, then the title did not vest in the donee, and the jury must find for defendant.

All of which instructions were refused by the court. The court then charged the jury, at the instance of the counsel for the plaintiff, as follows:

"That if they believed, from the evidence, that Samuel Collins had always lived with defendant since the making of the gift by the defendant of the slaves in controversy, then they had a right to infer a delivery of the slaves to said Samuel Collins; and further, that the words 'guardianship and protection' embraced in the *habendum* of the deed, did not authorize defendant to retain the property in controversy in his possession."

Carradine moved for a new trial, which being refused, he prosecuted this writ of error.

Mount and Burrus, for plaintiff in error.

John Battaile, for defendant in error.

There is no difficulty in the case, because there is clearly no error in the judgment of the court below. The first, second and fourth instructions asked for, counsel for plaintiff in error did not apply to the facts of the case. The donees are the half brothers and sisters of plaintiff in error, and lived at the time and the most of them have continued to live with the plaintiff in error until just before the trial of the cause, as appears from the evidence. From these circumstances and the relationship of the parties, as much, and all of the possession that could be delivered to the parties, donees, and as complies with the requirements of the law, was delivered to and had by the donees. 5 Ran. 211 — 220; 4 H. & M. 151; 3 Munf. 122.

The third instruction asked for by plaintiff in error was also rightly refused, because there was no reservation of guardianship and control in the deed, and had there been, it would have been inconsistent with the deed and void. There are no terms in the deed which in law will bear such a construction as would establish such reservation.

The instructions asked for defendant in error were certainly the law of the case. The words in the deed of gift, "under my own proper guardianship and protection," were of no effect and inoperative. They were repugnant to the estate created by the deed, and are void therefor. Conditions in a deed or other instrument of writing repugnant to the estate

created by such deed, are void. 8 T. R. 60; 1 Mod. 141; 6 Petersdorff's Abr. 60; 4 M. & S. 66; 3 Abr. of Am. Com. Law Cases, 208, 209, (note); 2 Caines's R. 345, 352, 353.

If the said words have allusion to the guardianship of the minors, the donees, they would be equally void. For no man can by our law be self-constituted legal guardian of minors. Unlawful conditions in a deed are void. 1 Bac. Abr. 644; 1 Bouv. Law Dic. 202.

Guardians have a legal right to the exclusive possession and control of the infant's property so long as the guardianship continues. 3 Rob. (Va.) Pr. 470; 6 R. 559, and authorities there cited. 2 P. Wms. 122; 7 J. C. R. 150; 5 Ib. 66; 8 Cow. 198; 17 Wend. 75.

The motion for a new trial was also properly overruled. The objections to the verdict's standing, embodied in the reasons on which the motion was based, have already been met and answered in part. The evidence, in the shape of affidavits to sustain the motion, fall far short of showing anything like surprise. Such an excuse of surprise might be urged in every case. Nor is there evidence of, nor was there any interference with, the jury on the part of one of the witnesses of plaintiff below. The attempt to show this is a signal failure.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This was an action of replevin by Collins, a minor, by his guardian, against Carradine, for the recovery of two slaves. Several witnesses proved that Carradine had repeatedly declared that the slaves belonged to Collins. Carradine's schedule as a bankrupt was also introduced, which did not include these negroes as part of his property. The defendant, in the court below, to rebut this showing on the part of the plaintiff, introduced a deed of gift, made by himself to Collins, who was his half-brother, which was admitted to have been recorded. This deed of gift it seems was the foundation of Collins's title. The defendant took exceptions to the decision of the court in giving certain charges asked by plaintiff's counsel, and in refusing charges asked for defendant. A new trial was also moved for

and overruled, to which the defendant excepted. We shall confine our remarks to two of the instructions which the court refused to give.

In the first place the defendant's counsel asked the court to instruct the jury that if the negroes had always been in possession of the donor, and that when he made the deed of gift he thereby reserved the use of the negroes until he should choose to perfect the gift by delivery, then they must find for the defendant. The fourth instruction asked, was that if the jury believed, from the evidence, that the gift of the slaves was not accompanied by delivery of possession to the donee, then the title did not vest in him, and they must find for the defendant. It seems that when the gift was made, and for several years afterwards, Collins lived with Carradine, and that the negroes during that time had remained in Carradine's possession.

The principle invoked by the charges asked is, that no gift of chattels is valid without delivery, and by refusing to give the charges, especially the last, the court in effect decided that such a gift may be valid without delivery, either actual or constructive. So the jury must have understood the law. As between donor and donee, the gift of a chattel is incomplete without delivery, or some act equivalent to delivery, if at the time the thing be susceptible of transmission. We do not say that actual delivery is necessary; it may be constructive or symbolic. Perhaps the delivery of a deed, or having it recorded, might be regarded as circumstances sufficient to amount to delivery, or to justify the presumption that delivery had been made. We do not now decide what is a sufficient delivery, or what is sufficient evidence that it was made. We only decide that delivery, actual or constructive, is necessary. This was the doctrine held by this court in *Thompson v. Thompson*, 2 How. 737, and in *Marshall v. Fulgham*, 4 Ib. 216. And it is in accordance with the current of decisions in other states on this subject. *Cook v. Husted*, 12 Johns. R. 188; *Grangiac v. Arden*, 10 Ib. 293. Delivery is a question of fact for the jury to determine. In the last case cited it was decided that the jury

had a right to take into consideration the repeated declarations of the donor that a gift had been made. The subject of the gift was a lottery ticket by a father to his infant daughter. He wrote her name on the back of the ticket, but received the prize himself, and this circumstance, accompanied by his declarations, was deemed sufficient to establish the gift, although there was no proof of an actual delivery. In this case the declarations of Carradine, the situation of the parties, and all other circumstances might have been left to the jury, but they were of course of no value when the jury must have received the impression that no delivery was necessary.

The judgment must be reversed, and cause remanded.

JOSEPH HEYFRON et al. vs. THE MISSISSIPPI UNION BANK.

Where to an action of assumpsit, in which there is more than one count, and the defendants plead *non assumpsit* to the whole declaration, and special pleas to the first count, and the plaintiff demurs to the special pleas, it is error for the court, on sustaining the demurrer, to enter a judgment final against the defendants, without a trial of the issue.

Where a demurrer to a plea is sustained, the judgment of the court should be *respondeat ouster*, and not *quod recuperet*.

It seems a plea *puis darrein continuance*, in this state, is not a waiver of other pleas previously filed.

In error from the Jasper circuit court; Hon. Van Tromp Crawford, judge.

The Mississippi Union Bank sued Joseph Heyfron, Asa Hartfield, Seymour White, and Elias Brown, in assumpsit upon a promissory note. The declaration, besides the count on the note, contained the common counts. The process was served on all the defendants but White; the other three defendants plead: 1. Non assumpsit; 2. To first count in the declaration, a plea of usury; 3. At a subsequent term, by leave, they plead *nul tiel corporation*; 4. A further plea of usury; and 5. A plea *puis darrein continuance*, that the bank had assigned the note sued on, since the institution of suit. To the last plea the plaintiff demurred, and the court sustained the demurrer; and thereupon gave judgment by default for the plaintiff against the defendants, for the sum of \$603, the note being for \$500; and they sued out this writ of error.

Heyfron and Dozier, for plaintiffs in error.

1. The demurrer to the plea *puis darrein continuance* admits all the facts therein stated. There being no special cause of demurrer stated; matter of form need not be regarded. The plea

avers that by virtue of the deed of assignment, all the right and title of the bank to the causes of action in the declaration mentioned, were thereby vested in the assignees. In the case of *Oldham v. Ledbetter*, 1 Howard, 46, it is decided that all notes, by the common law, are transferable by mere delivery, and that it operates a complete divestment of all right to their contents, and of all authority to control their appropriation on the part of the payee. It would appear, therefore, that by the deed of assignment, all right to the causes of action in the declaration mentioned, were divested out of the bank.

It is very difficult to conceive how the bank, after such an assignment, could recover in a court of law. 2 How. 646.

2. It may be objected that the plea is not supported by affidavit. The English practice requiring an affidavit of the truth of such pleas, is founded on a rule of the courts of that country, not in force here. And even there and in New York, such a defect is merely an irregularity, which is waived by the demurrer. 10 Johns. R.

3. The court below considered the last plea as a waiver of all the others, and in giving judgment, acted as if they were not on the record. The position is correct by the rules of the common law, and also true under the statute of Anne, permitting double pleas by leave of the court. The courts, where that statute is in force, will regard such a plea a waiver, because, strictly speaking, the admission of a second or more pleas in bar, is, by the statute, left to their discretion, in the exercise of which, to prevent delay, they consider pleas of that character, as at common law, a waiver of the former plea. But, under our statute, I think the courts here have no such discretion. By the statute of 1838, H. & H. 597, it is made lawful for the defendant to plead as many pleas, in bar of the action, as he shall choose. The words "many as he shall choose," embrace all pleas of every character that are in bar, any one of which might have been pleaded to the same class of actions, by the rules of the common law. The meaning of the statute evidently is, that the defendant may plead a plea *puis darrein continuance* in bar, together with other pleas, it being, by the common law, "a plea in bar of the action."

4. Admitting the plea *puis darrein continuance* to have been bad, and that it was a waiver of former pleas, the judgment on the demurrer should have been a *respondeat ouster*.

1st. Because it was the first demurrer determined by the court on joinder. *Brown v. Smith*, 5 Howard, 395.

2d. If the plea waived all former pleas, it was a substitute for the first plea, the general issue now to that plea, (no demurrer reached,) the judgment should have been the same as if the first plea (the general issue) had been defective, which undoubtedly would have been a *respondeat ouster*.

The plea *puis darrein continuance*, was pleaded under and by virtue of the common law right to interpose such pleas, and if defective on demurrer, the judgment should be to answer over. It would be strange indeed, if the courts held such a plea a waiver of all other pleas, and on demurrer to it, pronounced a judgment of *quod recuperit*.

PER CURIAM. The plaintiffs in error were sued on a promissory note. Process was not served on one, and the other three pleaded non assumpsit and two special pleas. The plaintiff took issue on the first plea, but demurred to the others, which were only pleaded to the first count. On argument of the demurrer, it was sustained, and final judgment rendered against all of the defendants. This was error. There was an issue undisposed of, on which the defendants were entitled to a trial. But the judgment on the demurrer was wrong; it should have been *respondeat ouster* instead of *quod recuperit*.

Judgment reversed, and cause remanded.

PERRY COHEA et al. *vs.* THE COMMISSIONERS OF THE SINKING FUND.

Under the statute of this state, (H. & H. 413,) limiting the period in which claims must be presented against estates of deceased persons, and providing that, on a failure to present, the claim is barred and the estate discharged from the debt, if a creditor, who holds a note against a principal and sureties, fails after the death of the principal to present it to the administrator within the prescribed time to save the bar of the statute, the sureties are not thereby discharged.

Johnson v. The Planters Bank, 4 S. & M. 165, cited and confirmed.

It seems that the statute, limiting the period in which claims may be presented against estates of deceased persons, and providing, among other things, that on a failure to present, *the estate is discharged from the debt*, is but a statute of limitations.

In error from the circuit court of Adams county; Hon. C. C. Cage, judge.

The commissioners of the sinking fund sued Perry Cohea and others upon a note made by Charles C. Mayson as principal, and the defendants as his sureties. The defendants plead *non assumpsit* and the following plea, viz.: "That the said note in said declaration mentioned and set forth, was, at the time of the making thereof, signed also by one Charles C. Mayson, by the name of Ch. C. Mayson, and that said note was made and delivered to the said plaintiffs by the said Mayson, for a loan of money made by him from said plaintiffs, and that these defendants signed and executed said note merely as the sureties of said Mayson, and for no other consideration whatever, and these defendants have not received for their said securityships any advantage or indemnity whatever, and that the said plaintiffs well knew, at the time of the making and delivery of the said note, that these defendants signed and executed the same merely as sureties of said Mayson, and not otherwise; and these defendants aver that after the making of said note, to wit, on the —

day of — A. D. 1837, in the county of Hinds, the said Charles C. Mayson died intestate, and afterwards, to wit, at the October term, A. D. 1837, of the probate court of Hinds county, in this state, letters of administration on the estate of the said Charles C. Mayson, deceased, were granted to Mary E. Mayson and David Shelton by the said probate court of Hinds county, that being the court having jurisdiction of the same; and the said Mary E. Mayson and David Shelton were then and there duly qualified, and did enter upon their duties as such administrators; and these defendants further aver that afterwards and within two months after the granting of the letters of administration aforesaid, the said administrators published in the *Southern Whig*, a newspaper printed in this state, a notice requiring all persons, having claims against the estate of the said Charles C. Mayson, their intestate, to exhibit the same within the time limited by law, or that the same would be barred; which notice stated the granting of said letters of administration at the time aforesaid, and was in said newspaper published continuously once a week for six months according to law; and these defendants further aver that the said plaintiffs were at the time of said publication, and have ever since continued to be, residents of this state; yet the said plaintiffs did not, within eighteen months after the publication of said notice, present or cause to be presented to the said administrators the said note or claim sued on, but wholly neglected so to do; whereby the said claim hath become forever barred, and the estate of the said Mayson forever discharged from the payment of the same; wherefore these defendants say that as sureties of said Mayson they are released and discharged from the said note or any liability for the same, all of which they are ready to verify wherefore, &c."

The plaintiffs below demurred to this plea, and the court sustained their demurrer. The case was then tried on the issue, and the jury finding for the plaintiffs, the defendants have the case here for revision.

Quitman and McMurran, for plaintiffs in error.

1. We are aware of the decisions heretofore made upon this

Cohen et al. v. The Commissioners of the Sinking Fund.

subject, by this court, in the cases of *Kerr v. Brandon*, 2. How. R. 910; *Johnson v. Planters Bank*, 4 S. & M. 165; and *Aricks' heirs v. Trustees of Jef. College*, decided at this term, and we admit that the two first cases referred to, are much in point against us. The latter case, although the principle was reiterated, yet it was decided upon a different question. It was the case of a mortgage, which was held to be sufficient presentation by being recorded. The case from 2 Howard, contains many doubts of the court, upon the points involved. It can scarcely be regarded as a decision on any of the points involved.

The statute under which we claim to be released, is found in H. & H. 413, § 92. This statute has none of the characteristics of a statute of limitations. It *bars* the *claim*, not the *remedy*. It cannot be revived by a subsequent promise, nor by a repeal of the statute. When once barred, it is forever extinguished. It may be given in evidence without being pleaded specially.

The penalty imposed upon a defaulting creditor, is not then a suspension of his remedy, but a total extinction of his right.

The obligation of a surety being only accessory to that of the principal debtor, becomes extinct by the extinction of the latter. Theob. on Surety, 2, 73, § 148. We admit that there appear to be some exceptions to this rule, but we have not been able to find any case where an exception is made of cases in which the obligation of the principal is extinguished by operation of law.

The construction of the words in Theobald, 273, does not warrant it. The pronoun *which* should be taken as relative to the precedent words "bankruptcy and certificate," and the only case referred to is *Brown v. Can*, 7 Bingham, which does not lay down such rule. The question there was, whether the creditor, by signing the certificate of the bankrupt, released the surety. The court held that the creditor was morally bound so to do, and that they would not visit his compliance with a moral obligation, with a penalty. Theobald, 102.

The people of England are peculiarly a commercial community. Our policy is more that of the civil law, and under it there is no exception to the general rule, that whenever the

principal obligation is extinguished, the surety is discharged. 1 Domat, 378; 1 Poth. on Con. 182.

It was so held by Chancellor Buckner, in *Miller v. Gaskins*, 1 S. & M. Ch. R. 526. The relation of surety was better understood by the civilians, than by the common law writers. They hold the simple and plain proposition, that the accessory cannot exist without its principal, and that the former must cease with the latter.

The rigid policy of the common law has changed this rule, but natural justice still demands, that he should neither by omission or commission, release the principal. Chancellor Kent recognized this as a rule of equity, when he compelled a resident creditor of New Jersey to pursue his real security there before he should be permitted to sue a personal surety in another state. *Hayes v. Ward*, 4 J. Ch. R. 123.

2. We insist the creditor was bound to keep alive the *claim*. He was notified by the administrator so to do. The law requiring him to present it constituted a part of his implied obligations to the surety. Negligence on the part of a creditor will discharge a surety if he is damnified. *People v. Bor*, 13 J. R. 383; *Ibid*. 174; 7 J. R. 332; 17 J. R. 384; *Capel v. Butter*, 2 Sim. & Stu. 457, cited Theob. on Surety, 98, 103.

On the question suggested by the court on the argument, whether the state is not the substantial plaintiff or party interested, and therefore not bound by the statute requiring presentation of claims — We think the state is not in contemplation of law a party to this suit. The power of the commissioners to loan this money on notes with security is not expressly given by any law. It was held merely to be lawful for the commissioners to do so under the power to manage it. In that management they acted for themselves and on their own responsibility.

The state is merely collaterally interested; not more so than it was in the assets of the Planters Bank; nor more than it now is in those of the Mississippi Railroad Company. But this is not a limitation, it is a bar.

Freeman, attorney-general, for the defendants in error.

1. The note sued on belongs to the state of Mississippi; the

Coea et al. v. The Commissioners of the Sinking Fund.

commissioners appointed to manage the same, being mere agents of the state, the state is therefore the real party in interest. *Walker v. Com. of Sinking Fund*, 6 How. R.; 1 S. & M. R. 179; *U. S. v. Hoar*, 2 Mason's R. 314.

2. The holder of a note is not obliged to pursue all his remedies against the maker, in order to render the indorser liable on the note. Bayley on Bills, 365; 6 Wend. 610; 8 Wend. 194.

If a creditor fails, after the death of principal, to present case to administrator of same, the sureties are not thereby discharged. 4 S. & M. 167.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This action was instituted on a promissory note made by Mayson as principal, and the plaintiffs in error as sureties. Mayson died before the institution of the suit, and the defence is that the note was not presented to his administrators within eighteen months after they gave notice to creditors to present their claims, and that as the estate of Mayson was thereby discharged, the sureties are also discharged.

This same question was raised, and very deliberately considered in the case of *Johnson v. The Planters Bank*, 4 S. & M. 165, and it was decided that the sureties were not discharged by such failure to present the claim to the administrator of the principal. We have been pressed to review that decision. It is said that by virtue of the statute the claim is barred and the estate discharged in case it is not presented, and that inasmuch as the obligation of the principal is totally extinguished, the accessory obligation of the surety must be also extinguished, as it has no subsisting obligation to rest upon. This doctrine of the civil law is true as a general rule, but it is subject to exceptions; there are cases in which the surety is bound more rigidly than the principal, and cases again in which the surety is bound when the principal is not; as in case of infants when the contract is absolutely void. But is it not going too far to say that this statute differs from an ordinary statute of limitations, and extinguishes the obligation, and not the remedy merely. We have held directly the reverse. *Miller v. Trustees of Jefferson Col-*

442 HIGH COURT OF ERRORS AND APPEALS.

Cohea et al. v. The Commissioners of the Sinking Fund.

lege, 5 S. & M. 651. By regarding this as a mere statute of limitations, the force of the argument is defeated. But it is also insisted that the plaintiffs in error have sustained a positive injury, by the neglect to make the presentment, in the loss of their recourse against the estate. They had a remedy, and if they have lost it, the fault is theirs. Besides, it is premature to complain of loss, before that point is decided against them. It may be that they still have a remedy. Altogether we see no reason why we should recede from the decision in the case of *Johnson v. The Planters Bank*, and accordingly affirm it.

Judgment affirmed.

COMMERCIAL BANK OF COLUMBUS, use of the Planters and Merchants Bank of Mobile vs. JOHN THOMPSON, ROBERT BELL, WILLIAM MONTGOMERY, and WILLIAM THOMPSON.

The act which prohibits the banks of this state from assigning their negotiable securities, and requires them to receive their own notes in payment of all debts due them, was intended for the benefit of the debtors of the banks, and they may waive their rights under the act, if they choose to do so. Where therefore a bank assigned a note, and the assignees instituted suit, and recovered judgment thereon, without the defendant's pleading the assignment in abatement, the defendants were held to have waived their right to pay in the notes of the bank.

If a bank in this state assign any of its evidences of debt, and the assignee bring suit thereon, the defendants can avail themselves of the benefit of the statute prohibiting the banks from assigning their evidences of debt, and requiring them to receive their own notes in payment of all debts due them, by plea in abatement only.

The assignee of a bank in this state, instituted suit and recovered judgment, and the defendants paid the notes of the bank into court, and made a motion to have the execution which issued on the judgment entered satisfied, and the court sustained the motion, and ordered the entry of satisfaction to be made: *Held*, that the assignee was not bound to receive the bank notes in payment, and the judgment ordering the entry of satisfaction was erroneous.

ERROR from the circuit court of the county of Octibbeha county; Hon. Benjamin F. Caruthers, judge.

This was an action of *assumpsit* brought by the Commercial Bank of Columbus, use of the Planters and Merchants Bank of Mobile, in the circuit court of Octibbeha county, against John Thompson, William Montgomery and Robert Bell, founded on their joint and several promissory note, in favor of the Commercial Bank of Columbus, for the sum of \$4611 46. The defendants pleaded *non assumpsit*. Judgment was rendered in favor of the plaintiff, and the execution

which issued thereon was levied, and a forthcoming bond given, with William Thompson as surety therein, and forfeited. At the return term of the execution which issued on the forfeited forthcoming bond, the defendants paid into court the amount of the execution with interest, in the notes of the Commercial Bank of Columbus, and entered a motion to have the execution and judgment entered satisfied. On the trial of the motion the defendants proved that on the 26th day of April, 1841, the note was in the hands of the agent of the Commercial Bank of Columbus, and the property of the bank. They also proved that they had tendered to the sheriff, in whose hands the execution was placed for collection, the amount of the execution in the notes of the Commercial Bank of Columbus, and he refused to receive them in payment. The court sustained the motion, and ordered the execution and judgment to be entered satisfied. Whereupon the plaintiff brought the case to this court by writ of error.

A. C. Baine, for plaintiff in error.

I suppose we may, on the part of the plaintiffs in error, concede, all the defendants contend for, and yet not touch the legal merits of this case. For the question evidently is, not what equities the defendants had under the statutes of this state, on the 4th and 5th of Anne; but when and before what forum they ought to have availed themselves of them. It is clear, that be their claim legal, or be it equitable, it is one that should be heard in a court of law; and they have very properly resorted to it. There is no dispute about the forum, then.

The only question is, then, when ought they to have interposed this defence, and how? They certainly ought to have done it at the time of the trial. And they ought to have done it by plea in abatement. The court, within the last two weeks, have settled this part of the case.

The defendants argue this whole case as if they were in a court of equity. Proceeding upon this view of it, shows very fully the grossness of their position and the error of the circuit judge. Suppose they were now in a court of equity,

setting up this defence, which they had neglected to make before a forum having jurisdiction of the cause and ample power in its nature, as well as express authority by statute, to have granted them relief; would they be heard? Certainly they would not. They would be told, without any hesitancy, that they had had an opportunity of making the defence before the legal tribunal which had before had jurisdiction of the right insisted upon, and that for their remissness in failing there to set it up the chancellor would, without argument or deliberation, turn them from his doors. I need not further argue the cause.

Harris and Harrison, for defendants in error.

The question presented is, whether the defendants have the right to pay the debt in the bills of the Commercial Bank.

The act of 1840, p. 15, sect. 7, provides "that it shall not be lawful for any bank in this state to transfer, by indorsement or otherwise, any note, &c." and by the supplement to the same act, it is declared that the banks in this state "shall at all times receive their respective bills at par in the liquidation of their bills receivable and other claims due them." The act of 1843, p. 56, sect. 8, contains a proviso to the same effect. The intention of the legislature is also made still more apparent by the statute of 1842, in relation to garnishments, when the transfer was effected by operation of law.

In the case of *Payne et al. v. Baldwin et al.* 3 S. & M. 679, it is said by the court that the bank "cannot sell that which it is illegal to sell, or which is not transferable from one to another."

"In England, notes received their negotiable character from 4th and 5th Anne; before that time they were not assignable, it being a general principle of the common law, that choses in action were not assignable." *Ib.* 678. With us they derive their character for negotiability from a statute, which declares that they may be assigned by indorsement. *Ib.* 680. To negotiate notes was a privilege enjoyed by the corporation solely

under this law, and it is one that was taken away by the repeal of the law. *Ib.*

The note upon which the judgment is predicated was not indorsed, and the whole proceedings are in the name of the Commercial Bank, the payee, for the use of a bank in Mobile. There has been no legal transfer of the title, which is still in the Commercial Bank, and the usee has but an equity which the courts of law will inquire into and protect, or not, upon the principles of courts of equity. 1 Tucker's Lectures, 347, and cases cited; 2 Story's Eq. 392, sect. 1056. "The corporation itself must be considered as the real plaintiff, and its right to prosecute the suit cannot be affected by the allegation that it is brought for the benefit of others." *Corporation of Washington, use of McCue et al. v. Young*, 10 Wheat. 406.

In treating of the assignment of choses in action, Story says: "In courts of law these principles of courts of equity are now acted on to a limited extent. But still whenever a bond or other debt is assigned, and it is necessary to sue at law, for the recovery thereof, it must be done in the name of the original creditor; the person to whom it is transferred, being treated, rather as an attorney than an assignee; although his rights will be recognized and protected, in some measure, at law, against the frauds of the assignor." 2 Eq. Jur. 392, sect. 1056.

It is against the assignor that he is to be protected, and that not because he has any right at law, but the courts of law, assuming the province of a court of chancery, *pro hac vice*, will look into the equities claimed, and enforce them, if by the doctrines of a court of chancery they ought to be protected.

In equity it is held that the assignee (even if *bona fide* such) has no enlarged or additional privileges; that he must, therefore, take subject to all equities of the obligor. Hence, in Virginia, even after judgment obtained in the name of the assignee, a court of equity permitted a debtor to set up his equitable defence against the assignor of a bond. The court say "that in England the assignee of a bond takes it charged with

every species of equity which was attached to it in the hands of the assignor. If a different principle prevail in this country it must arise by statute. *Norton v. Rose*, 2 Washington's R. 248."

The assignee of a chose in action, then, not indorsed, acquires no right against the debtor even after judgment, independent of the act of 1840, for even without this prohibition, he could only acquire the rights of the assignee in equity; he could acquire no legal right; he could maintain no action in his own name, and the rendition of judgment in the name of the party having the legal title, for his use, does not change the equitable interest into a legal right. As the equitable assignment could not therefore create any new right, the usee in the judgment only perfected his right to recover that which the Commercial Bank had a right to recover. For it is the Commercial Bank prosecuting its rights at law, for the use of another. The Bank clearly has no right to recover anything better than its own bills, and it could not by law assign any greater right. The law of 1840, was in full force at the time, and the parties must be presumed to have contracted in reference to it. At the time when the usee received the paper, the law prohibited the assignment, and still further made the note payable in the bills of the bank. The assignee, undoubtedly cannot get anything more than the assignor was entitled to at the time of transfer.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

Suit was brought in 1843, in the name of the Commercial Bank of Columbus, for the use of the Merchants Bank of Mobile, on a promissory note. No plea was interposed but the general issue, on which judgment was recovered. In satisfaction of the execution, the defendants tendered to the sheriff the notes of the Commercial Bank of Columbus in payment, which he refused to receive. The defendants then brought the notes into court, and moved to have satisfaction entered, which motion was improperly sustained.

It is true that the banks of this state are not permitted to

assign their negotiable securities; and it is also true that they are bound to receive their own notes in payment of all debts due them. But suppose they do transfer their notes, how does the maker avoid the transfer and still retain his right to pay in the notes of the bank? By plea in abatement, on which the action abates, so that the bank without his consent cannot defeat his right to pay in its own notes. *Planters Bank v. Thomas Sharp*, 4 S. & M. 17; *Trigg v. Lanier*, 6 S. & M. 641. The act prohibiting the assignment of notes, was intended for the benefit of the makers of the notes, and they may waive their right to insist upon it if they will. By failing to plead in abatement to a suit brought in the name of an assignee, the assignment is ratified. The statute points out the mode of making the objection, and declares that when made the action shall abate. But if the party fail so to plead, and permits the assignee to recover a judgment, it is then too late to insist upon a right which has been waived. The judgment fixes the rights of the parties. The usee, being the real plaintiff, is not bound to submit to a payment in bank notes.

The judgment must be reversed.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE PLANTERS BANK
OF THE STATE OF MISSISSIPPI, use of Hiram G. Runnels *vs.*
POLLY W. JOHNSON et al.

A literal compliance with the statute, pointing out the mode by which an administrator may sell the realty of his intestate, is necessary in order to enable the court to render a valid judgment for the sale of the land; and if the statute has not been strictly complied with, the order of sale and the sale are void; and the records of the probate court must show affirmatively that the statute has been in all respects complied with.

The recital in the records of the probate court, on an application for sale of a deceased person's realty, that "it appearing to the satisfaction of the court that publication has been made in pursuance of an order," &c., even if evidence that publication had been made, would not be evidence that citation had been posted up at three public places; and the statute requires both modes of notice.

Where realty of an intestate, who has but a bond for title when the purchase-money is paid, and who has paid but a part thereof, is sold by an administrator without giving the requisite notice, and the purchaser has executed his note, payable to the person to whom the residue of the purchase-money is due, in payment for the price bid at the sale, he may notwithstanding avoid the note, as the sale was absolutely void, and did not divest the intestate's right.

In error from the circuit court of Yazoo county; Hon. Morgan L. Fitch, judge.

The President, Directors, and Company of the Planters Bank of the State of Mississippi, for the use of Hiram G. Runnels sued Polly W. Johnson and Richard M. Johnson, Jr. upon a note payable on its face to the bank, for \$8,413⁴⁷/₁₀₀. The defendants plead *non assumpsit*; and on the trial proved that the note was executed for the purchase-money of a tract of land lying in Yazoo county, sold by order of the probate court of Hinds county at public sale by Cary D. Runnels, as the administratrix of the estate of Howell W. Runnels, deceased, to whose estate

it belonged. They read a copy of the records of the proceedings before the probate court of Hinds, by which the sale was ordered, from which it appeared that at the October term, 1836, the administratrix had applied for an order of sale of the realty to pay the debts of her intestate, as the personalty was not sufficient for that purpose; the court ordered citation and publication for thirty days in the "Raymond Times."

At the December term, 1836, the following order was made: "It appearing to the satisfaction of the court that publication having been made in pursuance of an order made at the October term last of this court, citing all persons interested in the lands, tenements, &c. of H. W. Runnels, deceased, to appear and show cause at the December term, 1836, of this court, why an order should not be made for the sale of so much of the lands, tenements, and hereditaments of said deceased that will be sufficient to pay his debts; no one now appearing, it is ordered by this court that the administratrix be authorized to sell the following described lands," &c.

At the October term, 1838, another application to sell the unsold lands was made, and at the December term of that year allowed. No other recitals touching the sale appear in the record, and no report of it was made to the court; the clerk certifies that no citation was returned or proof of publication filed in his court.

After the introduction of this record by the defendants, it was proved by the plaintiffs that the note sued on was made payable to the Planters Bank with the knowledge and consent of the defendants, and was deposited in that bank as collateral security for the payment of a debt due the state of Mississippi by the said Howell W. Runnels in his lifetime, and which was still due for the purchase-money of Seminary lands, being the same lands purchased by the defendants of the administratrix; that the state was indebted to the Planters Bank at the time of the execution of the note, and that this note with others was deposited with the bank to secure the payment of the debt due the bank by the state; and that the plaintiff obtained possession of the note for suit by act of the legislature; that the defendants

had been in quiet and undisturbed possession of the land ever since the purchase, and that neither actual or threatened eviction had occurred; that the bank did not discount the note nor advance money on it.

On this state of fact, the court below at the instance of the defendants, instructed the jury "that if the record of the Hinds county probate court did not show upon its face that the citation published in the paper was also posted up in three public places in Yazoo county, where the land was situated, the sale by the administratrix to the defendants was void, and they must find for them."

To this instruction the plaintiffs excepted; and the jury finding for the defendants, the plaintiffs prosecuted this writ of error.

W. P. Miles, for plaintiff in error.

The court erred in giving the instruction asked for by the defendant.

1. Because the probate court record flatly contradicts the presumption raised by the instruction. The record shows the order of sale made by the probate court of Hinds county; and in that order it is expressly recited, that it "appeared to the satisfaction of the court that citation had been published according to law."

Now I submit that each court, within the range of its jurisdiction, is judge of all matters that come before it; and the record, showing affirmatively that the probate court was "satisfied" that "citation had been published according to law," is conclusive as to that fact.

Independent of this fact, the note sued on was made payable to the Planters Bank with the knowledge and consent of the defendants, and was deposited in said bank as collateral security for the payment of a debt due the state of Mississippi by Howell W. Runnels in his lifetime, and which is still due by his estate for the purchase-price of "Seminary lands." And these are the same lands purchased by the defendants from Howell W. Runnels's administratrix, for which the note sued

on was executed. In connection with this feature of the case, it was proved that the State of Mississippi was indebted to the Planters Bank, at the time said note was given, and that the note was deposited with the bank as collateral security for the amount due it by the state.

Now I submit that be the probate court record ever so defective, the plaintiffs are entitled to recover. For, the lands sold to H. W. Runnels being "Seminary lands," no title could be made to him until the whole purchase-money was paid. He died, leaving part unpaid. The lands, thus incumbered, were sold by his administratrix. The defendants purchased with a knowledge of that incumbrance; made their notes payable to the Planters Bank, and had them deposited there with the purpose of extinguishing the incumbrance by the proceeds of the notes.

That the extinguishment of the state's *lien* would have conferred upon the defendants a valid title is clear beyond dispute. For H. W. Runnels never having acquired title to the land, none was cast upon his heirs at law by descent. And the only party holding an adverse claim to the defendants was the state, whose right might at any time have been extinguished by the payment of the notes executed by the defendants and deposited with the Planters Bank for that purpose.

George S. Yerger, for defendants in error.

1. The sale having been made under the first order, to wit: the one made at December term, 1836, although the sale did not take place perhaps for upwards of a year after, judging from the date of the note, the question is, is the sale void? If it is, the note is without consideration, and void.

There is no order of publication on file, and the only evidence in the record is that the citations were ordered to be published thirty days in the *Raymond Times*; and the court, when it ordered the land to be sold, recites in its order "that it appearing to the court, that publication was made in pursuance of the order made at its last October term, it is ordered," &c. This being the only evidence of notice, shows that publication was

The Planters Bank of Mississippi v. Johnson et al.

made for thirty days in the Raymond Times. And the question is, — is this sufficient constructive notice? It is clear that it is not. The statute requires the citation to be published — days, and also to be posted up at three of the most public places in the county. This latter requisite is entirely omitted. This court has so repeatedly decided the question, that it is useless to do more than refer to its repeated decisions. 5 Howard's Rep. 739; 1 How. R. 62 *a*; *Campbell v. Brown*, 6 How. R. 230; *Puckett v. McDonald*, Ib. 269; *McDonald v. Rodgers*, Ib.; *Gwin v. McCarroll*, 1 S. & M. 351; *Smith v. Denson*, 2 S. & M. 326. See also 2 S. & M. 337; 3 S. & M. 646.

Again, if the sale was had under the last order, it would be void. The last order is, that citations be published, and also be posted up at three public places in Hinds county.

The statute requires the notice to be posted up at three public places in the county where the lands lie. The bill of exceptions shows that the lands purchased by Johnson, under the order of the probate court, lie in Yazoo county; the notices ought therefore to have been ordered to be posted up in Yazoo county. H. & H. 408. It is therefore clear beyond doubt, that the sale is void, and the judgment below ought to be affirmed.

Work, on the same side.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This was an action on a promissory note, made payable to the Planters Bank, though given to the administrators of Howell W. Runnels. The defence set up was, that the note was given for land sold under an order of court by Runnels's administrators, to which the purchaser acquired no title, because the requisite citation and notices were not given before the order of sale was made.

The statute provides, that if the personal estate of a decedent be insufficient to pay his debts, the probate court may order the land to be sold, the administrator petitioning for that purpose; and on such petition being presented, the court shall order a citation to issue to all persons interested in the land, to appear

before the court at a certain time, not less than forty days thereafter, to show cause, if any they can, why the land should not be sold; which citation is directed to be set up in three of the most public places in the county where the land lies, and to be also published for the same time (thirty days) in one of the public newspapers of the state.

By the repeated decisions of this court, a literal compliance with this statute is necessary in order to enable the court to render a valid judgment for the sale of the land; and if the statute has not been strictly complied with, the order of sale and the sale are void, and the purchaser acquires no title. Not only must the statute be strictly followed, but the records of the probate court must show affirmatively that everything has been done which the statute requires should be done preceding the order of sale. As it is a special jurisdiction acquired over the thing and the persons interested by constructive notice only, the records must show affirmatively that the court had jurisdiction. *Campbell v. Brown et al.* 6 How. 230; *Puckett v. McDonald*, 1b. 269; *Gwin v. McCarroll*, 1 S. & M. 351; *Smith v. Denson*, 2 S. & M. 326.

The reason for this strictness in the law is plain enough. No one can be deprived of his property but by judgment of law, and no court can render such judgment without giving the party an opportunity to be heard. He must be notified by process. The citation is the process, and the publication of it in a newspaper and the posting of it up at three public places, constitute the service, and as it is but constructive service, it is incomplete unless both acts have been performed; otherwise the court has not jurisdiction.

On examination of the record of the probate court, it appears that there were two applications to sell, one made at October term, 1836, and the other at October term, 1838, and the court made orders accordingly that citations should issue. At December term, 1836, an order of sale was made, under which this land was probably sold. In that order it is recited, that "it appearing to the satisfaction of the court that publication has been made in pursuance of an order made at the October term

last of this court, citing all persons interested in the lands, tenements, &c. of H. W. Runnels, deceased, to appear at December term, 1836, &c. &c.; and no one now appearing, it is ordered, &c." This, it is insisted, was sufficient evidence that the law had been complied with. Assuming that this was evidence that publication had been made, still it was not evidence that citation had been posted up at three public places, for by publication we must understand that the citation had been published in a newspaper.

And it is also said, that this note was given for Seminary land, which Runnels had purchased of the state, to which he could get no title until all the purchase-money was paid, part of which remained due, and that this note was made payable in bank with a view to the liquidation of that debt, and the extinguishment of the state's lien, of all which the defendants had notice. This objection would be entitled to great weight if the contract had been made between private individuals, because by it the purchaser would have acquired all the title the vendor had; but in this instance, the administrators have parted with no interest; whatever interest the estate of Runnels had, it still holds. The sale was utterly void, and the administrators are suing to recover the purchase-money for a thing which they have not parted with. The instructions given by the court were therefore correct.

The judgment must be affirmed.

WILLIAM F. WALKER vs. SAMUEL GILBERT AND OTHERS.

Possession of real estate is notice of the title of the possessor; and if he be in possession under an unrecorded deed, the property will not be subject to judgments against his vendor, rendered since the execution of the deed.

It seems that it is improper to allow a supplemental bill which contains nothing that was not fully known to the complainant at the time he filed his original bill; but if such a supplement be filed, and be not objected to in the court below, and the chancellor entertain jurisdiction of it, the objection will not prevail in this court.

If a purchaser of real estate has protected himself by covenants, he is not entitled to be relieved from his contract, if it be unmixed with fraud, until after eviction.

Fraud vacates all contracts, and whenever it is charged, must be answered; yet if the fraud be charged in a case which will not justify the rescission of the contract, or in a case in which the court cannot give relief, it need not be answered.

Where E. sold a tract of land to P., representing that the title was unincumbered, though at the time it was largely incumbered, and P. gave a note to E. for the purchase-money, with W. as his surety; and the assignee of E. sued P. and W. at law upon the note, and obtained judgment; and W. filed a bill in chancery to enjoin the judgment at law, on the ground of the fraud committed by E. on P. in the sale of the property, and did not make P. a party to the bill, and P. did not complain of the judgment at law; *held*, that W. was not entitled to be relieved therefrom.

Whether a surety can ever avail himself of a defect in the contract of his principal, — *Quære?*

The interpretation of the chancellor of the rules of his court, are a safe precedent for this court; and where, notwithstanding a rule of practice that no motion to discharge an injunction on the face of the bill, would be received, yet, if the chancellor entertain such motion, it will be considered that the chancellor considered the rule inapplicable to the case; and it seems that such a rule ought not to apply to a case where no decree could be made, if the facts were admitted.

On appeal from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

Walker v. Gilbert and others.

The bill in this case, filed by William F. Walker, as sole complainant, charges that on the 23d of November, 1840, Samuel Gilbert and others, partners under the style of Gilbert, Bailey and Draper, who were the sole defendants, obtained judgment by default against the complainant, in the circuit court of Madison county, as surety for George R. Fall and Samuel M. Puckett, against whom also judgment was rendered for about \$900; that an execution had been levied on his property; that he had no notice of the suit until the execution was levied that the writ was not personally served; that the judgment was founded on a note made by Fall and Puckett, as principals, and complainant as surety, given for a lot in the town of Madisonville, purchased by Fall & Puckett, from Enloe, Johnson & Co. who executed a deed to Puckett alone; that Enloe, Johnson, & Co. bought of Burroughs, who bought of Williams & Walker, who purchased of John S. Gooch, on the 11th of January, 1836; that the deed from Gooch was not proved or acknowledged, and recorded according to law; and a judgment was rendered on the 22d day of October, 1836, against Gooch & Williams, in favor of C. Marsh & Co. under which the lot of ground was sold in August, A. D. 1840; by which means the consideration of the note had failed. The bill prayed for an injunction and a new trial.

The answer denied that the complainant had not notice of the suit at law, and averred that the complainant knew that the judgment against Gooch, under which the lot was sold, had been paid before the sale; that the complainant himself became the purchaser at a small sum, which they were willing to refund if required; that he had the property in possession, and Puckett had never been legally evicted.

The chancellor dissolved the injunction in April, 1842; and in May, 1843, a circuit judge granted another injunction on a supplemental bill, which alleges that the note on which the judgment was rendered, was given for the purchase-money of a lot of ground, in the town of Madisonville, in Mississippi, sold by Enloe, Johnson, & Sitler to Samuel M. Puckett. That complainant was only surety upon the note. That at the time of

Walker v. Gilbert and others.

the sale, Enloe, Johnson & Sitler represented their title to the lot to be "indefeasible, and free from doubt and incumbrance." That Enloe, Johnson & Sitler knew that said representation was false, and that they had not a good and indefeasible title to the lot of ground, free from incumbrance. That the representations misled Puckett. That Enloe, Johnson & Sitler had no title at all to one half of the lot sold. That the other half of said lot was subject to the lien of a judgment against John S. Gooch, under whom said Enloe, Johnson & Sitler claimed title, and that under said judgment the interest of Gooch has been sold. That there are against Robert J. Walker, one of the grantees, under whom said Enloe, Johnson & Sitler claimed title, judgments for a much larger amount unsatisfied, than the lot ever was worth. That in the deed from Enloe, Johnson & Sitler, made to said Puckett, they covenanted that they were seized of an "indefeasible estate, in fee simple, free from incumbrances done or suffered from them." That the covenant was untrue, and that said lot of ground was, at the very time of the sale, incumbered by judgments against Enloe, Johnson & Sitler "for a much larger amount than the property was then or is now worth, and that said judgment remains unsatisfied to this day." The deed from Enloe, Johnson & Sitler to Puckett, contains these words: "have granted, bargained and sold, conveyed and confirmed, and by these presents do grant, bargain, sell and convey, and confirm."

The chancellor, in January, 1844, dissolved the injunction granted on this supplemental bill, and Walker appealed.

J. S. Yerger, for appellant.

1. The bill shows a clear case of fraud upon the part of the vendors of the lot, which entitles the complainant to relief. 4 Howard R. 435; 5 Ibid. 673.

2. The misrepresentation did not alone consist of a misrepresentation of title, but of incumbrances existing upon it; under these incumbrances the property has been sold, and, of course, the consideration of the note has failed.

Whenever there is fraud and misrepresentation, the party

will not be compelled to await an eviction, or rely upon his covenants of warranty, before he can go into equity for relief. The fraud is equivalent to an eviction.

Eviction is only necessary to show the breach of the warranty. But if it appear that the party selling knew he had no title, and represented that he had, the false representations avoided the contract. In this case, the bill alleges that Puckett was misled by the false representations, and by means of incumbrances existing upon the property, has lost it.

3. Aside from every question of eviction, fraud or misrepresentation, it seems to me that the bill shows a complete failure, or rather want of consideration for the note sued on, and removes all necessity of an eviction, before the parties can apply for relief.

The words "grant, bargain, sell," in a deed, &c. constitute, in law, a covenant of seizure; viz.: "That the grantor was seised of an indefeasible estate, in fee simple, freed from incumbrances done or suffered from the grantor." This covenant extended to the whole land. Rev. Code of Miss. sec. 32, p. 459.

This covenant was broken as soon as made, if the party had no title, or if it was incumbered. 2 J. J. Marsh. R. 430; 1 Johns. R. 1; 4 Ibid. 72; 4 Cranch, 429; 11 Coke R. 60; 2 Sand. R. 171, c; 1 Touchstone, 169, 170; 4 Kent's Com. 2d ed. 471; 3 Hill's R. 134; 5 Johns. R. 53; Dyer, 303.

It is otherwise of covenants of warranty. They are not broken until eviction.

In this case, the land sold was incumbered by judgment liens against the vendors, for more than the land was worth. The estate was not indefeasible, and freed from incumbrance done and suffered from the party. The covenant was broken at the time it was made, and furnished to the vendees a complete cause of action.

4. It may be argued, however, that as the vendor could remove the incumbrances, and perfect the title, an eviction is necessary, as the title by relation would vest in the grantee. This rule can only apply to incumbrances created by others, not those suffered by the grantor himself.

The doctrine of title vesting by relation and estoppel, when acquired by vendor after sale, and before eviction, is derived from "*warrantia chartæ*," which was a real covenant, and upon eviction, lands of equal value were recovered by the warrantee. Hence, to avoid circuitry of action, the doctrine of relation and estoppel, upon a title acquired by warrantors, after sale and before eviction, was adopted. Coke, sec. 446, 265, and 265 a; 14 Johns. R. 191; 2 Yerger R. 396, 397.

5. In all cases where a subsequently acquired title has enured to the benefit of the vendee, it has been where the vendor's covenant was not broken, or where he had no cause of action, for if he had cause of action, the subsequently acquired title of the vendor could not divest it. Unless this were the rule, he would be entitled to his action, and yet the title be vested in him.

If a third person should evict him, and he sue on the covenant of warranty, and then warrantor should acquire the title, his right of action would not be divested, nor the suit barred. *Right v. Bucknell*, 22 Eng. C. L. R. 73.

6. It is a vested right to recover the money on the covenant of seisin, as soon as broken. If so, the failure of title accrued at the instant the covenant was made, and is a good defence for the price of the land sold, for if the suit could be sustained on the covenant of seisin, to avoid circuitry of action the courts will permit its being relied on, in defence to an action, for the price of the land sold between the parties; and an act of assembly extends it to assignees. If the covenant of seisin was broken at the time it was made, the consideration of the note failed. 2 Johns. Ch. R. 523.

7. The removal of the incumbrances by Enloe, Johnson & Co. would not give consideration to the note. If suit had been brought immediately for a breach of covenant of seisin, a subsequent acquirement of title, and removal of incumbrances, would not have defeated it. Platt on Cov. 590.

8. The doctrine of estoppels and relation, upon which eviction is based, is to promote justice. It does not avoid rights acquired in the mean time.

Run out the doctrine contended for. If suit is brought, will

a subsequent acquired title abate it? If judgment is obtained, will the execution be superseded or enjoined because of it? If the money is paid upon the judgment, can it be recovered back because of it? These consequences of the doctrine are too absurd to be contended for, yet they are covered by the principle assumed.

Again, the vesting of the title in the bargainee by relation, is only so by way of estoppel to the bargainor. He is estopped by his deed to set up his subsequently acquired title, to prevent circuitry of action. It is at the election of the vendee. If he does not rescind the contract, but agrees to abide by it, he takes the title. If he notifies him of a rescission, or files a bill, or commences suit, the estoppel cannot operate upon him. 1 Serg. & Rawle, 442.

9. There is no estoppel where there are covenants of seisin. They are personal, and do not run with the land, and cannot be assigned. 3 Johns. R. 365; 2 Ibid. 1; Platt on Covenants, 590.

The estoppel works only upon a warranty of title, which runs with the land, and is not broken until eviction. Hence, if the bargainor gets in the title before eviction, by a paramount title, it vests in the vendee from the date of the deed to him, and he never had cause of action. An estoppel always runs with the law. 8 Cowen's R. 558; 1 Salk. 276.

10. Now a covenant of warranty runs with the land, and constitutes an estoppel. The covenant of seisin does not run with the land; therefore there is no estoppel. The covenant of warranty is an estoppel running with the land upon both parties. This is a covenant, not that the grantor has title, but that he will defend it against all others. This he does when called in to protect his warranty, by showing paramount title in himself. Not so of a covenant of seisin. That covenants that the vendor has title, &c. As long as the covenant is unbroken both parties are reciprocally estopped from merging the grantor's title. The vendee cannot say the vendor has no title, nor can the vendor say he had not; for if he acquires the title subsequently, to set it up would be contrary to his covenant to defend it. He covenants to defend it, and yet is assailing it.

11. In acting on covenants of seisin, the forms of pleading establish my position. The breach assigned is, he was not seised at the time of sale, &c. A replication that he was seised at the time of sale, because he became afterwards seised, would be a departure, and bad. 1 Bay R. 357; 9 Coke's R. 71.

12. There was a fraud in concealing the incumbrances; and where there is a fraud it vitiates the whole contract, and aids all the securities. *Napier v. Elam et al.* 6 Yerger's R. 108.

A. H. Handy, for appellees.

The only matter presented to this court by the appeal, is the propriety of the order of the chancery court, dissolving the injunction granted on the supplemental bill. It is manifest that that court was right in dissolving the injunction, as it ought never to have been granted.

1. The injunction was granted by a judge of the circuit court, in a case already pending before the chancellor in the superior court of chancery. If relief had to be sought, that was the source from which it must come, and it was very incompetent for any other tribunal to interfere in the matter pending the cause in that court.

2. The supplemental bill, so called, has not a solitary feature of such a bill. The office of a supplemental bill is to bring before the court matters which have occurred since the original bill was filed. *Stafford v. Howlett*, 1 Paige, 200; Lubé's Eq. Pl. 136. This bill does not pretend to state any matter which occurred subsequent to filing the original bill. It contains nothing further than what is stated in the original bill, except a few general charges of fraud; and all this appears to have existed, if at all, when the original bill was filed. The court will not tolerate that a party should file his bill stating his case in part, and when this is decided against him, that he should come with a new statement of his case, and ask relief upon that. It was his duty to set out his whole case in his original bill; and failing to do so, he cannot be heard by supplemental bill. *Moss v. Davidson*, 1 S. & M. 144, a case strongly resembling the present.

3. But this supplemental bill was not, in point of law, filed. There was no order or permission of the chancery court for filing it; without such order the bill could not be filed. *Eager v. Price*, 2 Paige, 333. The injunction then issued on a bill which was not of record, and could not be, but by order of the chancellor. This bill was such an one as could never have been permitted to be filed. It was therefore proper that the injunction which issued upon it should be dissolved. It had no legal foundation to support it.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The complainant filed his bill in the superior court of chancery, to enjoin a judgment at law, which the respondents had recovered against him, in November, 1840, on a promissory note, made jointly by Fall, Puckett, Johnson, and complainant. An injunction was prayed, on the ground that the complainant had no notice of the suit at law, and therefore was prevented from making his defence, the merits of which consists in this; the note was given for a lot in the town of Madisonville, which was purchased by Puckett, one of the makers, in April, 1838, from Enloe, Johnson & Co. who derived title to the lot from John S. Gooch, through sundry mesne conveyances. Gooch had sold to Williams & Walker, in January, 1836, but the acknowledgment of the deed was not in proper form, although it was recorded; consequently the bill avers that it was liable to a judgment which had been recovered against Gooch, on the 2d of November, 1836, under which it was sold in August, 1840.

The answer denies, in the most positive manner, that the complainant had not legal notice of the pendency of the suit against him. It also avers that the judgment against Gooch had been satisfied, and that, through the instrumentality of the complainant, execution had been issued on it, and the lot sold, and purchased by the complainant for a very small sum, which the respondents offer to refund him, if necessary. By the answer the material allegations of the bill are all swept away. A motion was made to dissolve the injunction on bill and answer,

which was accordingly done by the chancellor, who gave an opinion at length on the merits of the case, which is reported in Freeman's Chancery Reports, 85, in which he gave a construction to the law in relation to conveyances, which has since received the sanction of this court. *Dixon & Starkey v. La-coate*, 1 S. & M. 70. We therefore concur with the chancellor in his disposition of this part of the case.

But the complainant then filed a supplemental bill, in which his ground for relief is materially varied from that taken in the original bill. On this another injunction seems to have been granted, which was also afterwards dissolved on motion, on the face of the bill, as there was no answer to the supplemental bill; and from this decree the complainant appealed.

This bill sets up fraud in representing the property as unincumbered, when in fact there were very large amounts in judgments against Walker, and against Enloe, Johnson & Co. at the times of their respective sales, which still remain outstanding and unsatisfied, and that Puckett was ignorant of such incumbrances. It also alleges that Enloe, Johnson & Co. made a covenant of seisin of an unincumbered estate, which was broken as soon as it was made, in consequence of the existence of the judgments.

It has been contended that this supplemental bill was improperly filed, and the injunction improperly allowed on it, as it contains nothing which was not fully known to the complainant at the time he filed the original bill, and that a supplemental bill is only allowed to introduce new matter. This objection is not without force, but if it was improperly filed, it might have been taken from the file. The chancellor, however, seemed to entertain jurisdiction over its merits by dissolving the injunction. The general rule, in relation to the facts disclosed, is, that if a purchaser has protected himself by covenants, he is not entitled to be relieved against a contract for real estate, unmix-ed with fraud, until after eviction. But fraud vacates all contracts, and whenever it is charged it must be answered. As a general rule it follows that when an injunction has been granted on a bill which charges such fraud as would vacate the con-

tract, the injunction ought not to be dissolved on the face of the bill. But it is believed that although fraud be charged, yet it must be presented in such a manner as to enable the court to give relief. The bill must show a case which would enable the court to set aside the contract for fraud, and as the chancellor has decreed that the injunction should be dissolved, if that decree is obviously right, it cannot be reversed.

This contract of sale was made between Puckett, and Enloe, Johnson & Co. and if there was fraud in the transaction it was perpetrated on Puckett, who was the purchaser, and to whom the deed was made. Walker sets out in his bill that he was a mere surety; the consideration did not pass to him, but to Puckett; but Puckett does not complain of fraud in the contract; he is no party to this proceeding, and for anything that appears, is content with his bargain. Suppose then the injunction should be made perpetual, what is the consequence? It would not vacate the contract. Puckett may still insist upon the contract. The effect would be to take from the vendor a part of his security, and leave the contract in force. Can this be done? It is evident that no decree that could be made in this cause could affect Puckett, for he is no party; the court cannot therefore interfere with his contract. Puckett and Fall were both defendants to the judgment, and the injunction suspended the execution as to them as well as to complainant. No reason whatever is shown why they are not made parties, which should have been done, if practicable. No relief could be given to the complainant without vacating the contract, which under the circumstances cannot be done. Walker cannot complain that the contract was void for want of consideration. The consideration was received by Puckett, which was sufficient to make the contract binding on Walker. Puckett seems to be still satisfied with his bargain; he does not deny but what he has received a full consideration; he does not aver that any fraud was practised on him. If he were before us he might admit that he purchased with full notice of incumbrances. A case is presented then by the bill in which no decree can be made; there is no equity in the bill as to complainant, and wherever no decree can be made, or

Walker v. Gilbert and others.

there is no equity on the face of the bill, the injunction may be dissolved before answer. *Minturn v. Seymour*, 4 Johns. Ch. R. 173; 1 Tenn. R. 196, cited in note to Eden on Injunctions, 115. We are aware that by rule of practice in the superior court of chancery, no motion to discharge an injunction on the face of the bill will be received, but the party must demur. Rule 21. The chancellor must have considered that rule as inapplicable in the present case, or he would not have dissolved the injunction, and his interpretation of the rules of that court must furnish a safe precedent. It seems to us that the rule cannot apply to a case in which no decree could be made, even if the facts were admitted. Under such circumstances there can be no propriety in retaining an injunction, which should never be granted except on a *prima facie* case for relief.

We do not mean to lay down a general rule that a surety can never avail himself of a defect in the contract of his principal. It is only intended to say that it cannot be done in a case like this.

The decree dissolving the injunction must be affirmed.

JOHN ANKETELL vs. GEORGE TORREY, PHILLIP O. HUGHES, DANIEL
G. MCPHERSON, and DUGAL TORREY.

It is fully settled that no payment of an execution in anything short of lawful money, to wit, coin of the United States, will amount to a satisfaction, unless it be with the consent of the plaintiff, in the execution.

The consent of a plaintiff, in an execution to receive bank notes in satisfaction thereof, may be express or implied, and all facts and circumstances, tending to show such consent, may legitimately be allowed to go to a jury.

A. made a motion against a sheriff and his sureties, for failing to pay over money collected on an execution; and the sheriff was permitted to prove that he collected the amount of the execution, in the notes of the Mississippi Union Bank, and notified the attorney of A. of that fact; and the attorney expressed no dissatisfaction respecting the character of funds collected; that about the same period, A. was in the habit of receiving from his agents and attorneys at law, without objections, the same kind of funds; that Union money constituted the circulating medium of the country, at that time, and it was uniformly received by clients; that the money was collected at the December term, 1839, and the motion was not made, until the November term, 1843, all of which evidence was objected to by A., but was permitted by the court to go to the jury, as tending to show the consent or acquiescence of A. to the receipt of the Union money in satisfaction of his execution: *Held*, that the evidence was legitimate, and not properly permitted to go to the jury.

Upon a motion against a sheriff and his sureties, for failing to pay over money collected upon an execution, where it was proved that the amount of the execution was collected in the notes of the Mississippi Union Bank, with the consent of the attorney of the plaintiff; that Union money at that time constituted the general circulating medium of the country, and was uniformly received by clients; that the plaintiff about the same time was in the habit of receiving from his agents and attorneys at law, without objection, large sums in the same kind of funds; that the money was collected at the December term of the court in 1839, and the motion was not made until the November term, 1843; the court could not properly instruct the jury that there was no legal evidence that the plaintiff authorized the sheriff to receive the Union Bank notes.

Anketell v. Torrey et al.

ERROR from the circuit court of Jefferson county ; Hon. Charles C. Cage, judge.

This was a motion made at the November term, 1843, of the circuit court of Jefferson county, by John Anketell against George Torrey, as sheriff, and Philip O. Hughes, Daniel G. McPherson and Dugal Torrey, as sureties on his official bond, for the failure of the sheriff to pay over fourteen hundred and seventy-three dollars and eight cents, collected by him on an execution in favor of said Anketell against Isaac R. and Wilson W. Wade, returnable to the December term, 1839, of said court. The defendants filed three pleas to this motion : 1st. A plea of tender. 2d. That by and with the consent and approbation of the attorney of record of the plaintiff in said execution, and with the consent and authority of the plaintiff, the said George Torrey, as sheriff, did collect and receive, in satisfaction of the execution in the motion mentioned, the notes of the Mississippi Union Bank, and he was always ready and willing to pay over the same to the plaintiff, and that he did offer and tender them to the plaintiff's attorney of record, and that he then tendered the same in open court. 3d. That the execution, mentioned in said motion was satisfied by the payment of the sum therein named in the notes of the Mississippi Union Bank, which defendants averred was a lawful bank of the state of Mississippi, and at that time paid specie at her counter on all demands presented, which were due ; and her notes circulated, paid and received, and in all business transactions were regarded as money. Issue was taken on the first and second pleas, and a demurrer filed to the third, which was sustained by the court. Upon the trial the plaintiff read to the jury the official bond of the sheriff, which was in the ordinary form. It being then admitted that William R. T. Chaplain, the attorney of record of the plaintiff in the execution, mentioned in the motion, died in September, 1840, the plaintiff rested his case. The defendant then produced in court the notes of the Mississippi Union Bank, and was permitted to prove, by Andrew Logan, that in 1839 he paid to William R. T. Chaplain, as attorney for John Anketell, about fifteen hundred dollars in the notes of the Mississippi Union

Bank; and in 1840 he paid to John Murdock, for said Anketell, between four and five thousand dollars in current notes of the banks of Mississippi, and that he never heard of Anketell making any objections to the said payments; — by John B. Thrasher, that in 1839, he, as attorney for Anketell, received the notes of the Mississippi banks, and he believed of the Mississippi Union Bank, in payment of debts due to Anketell, and that Anketell received the notes from him without any objections; that he did not recollect whether Anketell gave him any instructions as to the kind of funds to be collected; that Union Bank notes were received by general consent throughout the country as money; that as an attorney at law he received for collection in 1838 and 1839 a large number of claims, and collected large amounts in the current bank notes of Mississippi, and the attorneys of the state generally received bank notes up to the latter part of the year 1839, after which they generally refused to receive them. The currency remained good up to that time. None of the banks paid specie except the Mississippi Union Bank, which paid such of her issues as were due up to 1st January, 1840; that her notes were better, in December, 1839, in New Orleans, than they had been prior to that time; but they were not then at par; that his clients uniformly received from him payment of their claims in that kind of money, without objection; that he did not recollect of any instance of a departure from this rule by the lawyers of Port Gibson; that Mr. Chaplain about that time received such currency for his clients; that he believed the notes of the Union Bank were the best currency, at that time, in Mississippi; that he knows Torrey was about that time punctual in paying money collected by him as sheriff, and believes the most punctual sheriff with whom he did business.

J. B. Coleman proved that he was at Fayette in the fall of 1839, and about leaving for Port Gibson, when Torrey requested him to inform Mr. Chaplain, that he had collected the money in the case of Anketell's, in Union Bank notes; that immediately on reaching Port Gibson he called on Mr. Chaplain and delivered Torrey's message; that he did not recollect Mr. Chaplain's language, but thinks he expressed no dissatisfaction at the

Anketell v. Torrey et al.

receipt of Union Bank notes, though he thought Mr. Chaplain expressed dissatisfaction because Torrey did not send the money to Port Gibson, or at the idea of having to go to Fayette after it; that Union Bank notes were the best currency at that time in Mississippi. To all of which testimony the plaintiff objected, and the objection being overruled the plaintiff excepted. No further evidence being offered on either side, the plaintiff asked the court to charge the jury that "there was no legal proof that Torrey was authorized by the plaintiff to receive said Union Bank notes in satisfaction of said executions, and that without such proof the jury were bound to find the second issue for the plaintiff;" which charge the court refused to give, but at the request of the defendant charged the jury that "if they believed from the proofs aforesaid, that the plaintiff authorized the sheriff to receive the Union Bank notes, they should find said second issue for the defendants, otherwise for plaintiff." To which plaintiff excepted. The jury found a verdict for the defendants, upon which judgment was entered; to reverse which the plaintiff prosecutes this writ of error.

G. Winchester, for plaintiff in error.

This court has decided, that an attorney has no authority to receive anything in satisfaction of an execution but gold and silver, without an authority from his client, and that his general authority as an attorney is not sufficient. 2 S. & M. 81. Also that a sheriff has no authority to receive anything but gold and silver, without the authority or consent of the plaintiff. 2 S. & M. 514.

In this case, it is attempted to prove that the attorney consented to the authority of the sheriff to receive Union Bank notes, because when informed that the money had been collected in Union Bank notes by the sheriff, his informant does not recollect that he made any objections thereto.

This certainly is no proof of an authority from the attorney. But even if the consent of the attorney to the act of the sheriff could be implied from such proof, yet the attorney could not bind his client by such consent. For if, by his general authority,

he could not receive anything but gold and silver himself, he certainly could not by his general authority, give authority to the sheriff to do so.

Then as to the proof that the plaintiff authorized the sheriff to receive the Union Bank notes.

Proof that he had received from another debtor Union Bank notes in payment of a debt, or that another attorney in other cases had collected executions for him and paid in Union Bank notes, or that it was customary about the time for sheriffs to collect executions in Union Bank notes, and that attorneys received them from the sheriff, is no proof that the plaintiff in this case authorized or consented to the sheriff's collecting his execution in Union Bank notes. The court erred in not ruling out the evidence, and it also erred in refusing to charge the jury that there was no legal proof that the plaintiff authorized the sheriff to receive the Union Bank notes.

Montgomery and Boyd, for defendants in error.

It will be seen that there are but two questions involved in this case. 1st as to the admissibility of the evidence under the issue. 2d as to the propriety of refusing the instruction moved by plaintiff, and giving the instruction mentioned.

As to the first point, we think there can be but little doubt; it was competent to prove such circumstances as were calculated, by their combination, to satisfy the mind of the jury, that the plaintiff did consent to receive the then currency of the country, in satisfaction of his judgment. One fact sought to be proved was, that plaintiff, in his business transactions, was in the habit of receiving such funds as others did. The evidence of Thrasher and Logan tend to show that the plaintiff received the bank notes which were then current, without objection. Although Logan did not pay the money direct to plaintiff, he paid to his agent full five years before, and had not heard from plaintiff since, which are strong circumstances to show that he authorized those agents to receive such funds.

The evidence of Thrasher is more direct. He collected funds of the same description for plaintiff, about the same time and

Anketell v. Torrey et al.

paid them over, and no objections were made, which shows the willingness of plaintiff to submit to what was then the usage of the country, as is fully shown by Mr. Thrasher's deposition. Up to the time the funds were received by Torrey, all the collecting attorneys were in the habit of receiving such funds from sheriffs in payment of executions. This general acquiescence on the part of lawyers, acquiesced in by their clients, was *prima facie* justification to the sheriff, and when taken in connection with the further facts, that Anketell was in the habit of receiving such funds, under similar circumstances, and that his attorney in that particular case made no objections when informed of the funds collected, were certainly competent, and as we infer from the verdict sufficient to authorize the jury in finding the issue for defendants. As circumstantial evidence tending to prove plaintiff's consent, it was therefore admissible. Freem. R. 396; 2 How. S. Ct. R. 258.

As to the instructions, we think it is only necessary to read them to satisfy the mind the court was correct. What right has a court to charge a jury that there is no evidence of a particular fact before them, if any proof tending in the remotest degree to establish the fact, has been admitted?

Eustis, for plaintiff in error.

1. There was no authority from either the plaintiff or his attorney, *preceding* the collection.
2. The silence of the attorney, when the kind of paper collected was communicated to him, is no ratification by the principal. It is the first time we have heard that the omission of an agent is an act of the principal.
3. The attorney had no more authority than the sheriff to authorize a collection in anything but money on execution. The attorney had no such license to confer on the sheriff. *Keller v. Scott*, 2 S. & M. 82; *Gasquet v. Warren*, Ibid. 524; 5 How. 246; *Morton v. Walker*, 7 How.; *McFarland v. Gwin*, 2 How. U. S. Sup. Ct. R.

Mr. Justice THACHER delivered the opinion of the court.

The plaintiff in error filed a motion in the circuit court of

Anketell v. Torrey et al.

Jefferson county against the sheriff and his sureties on his official bond, for failing to pay over money collected upon execution. The defence relied upon by the sheriff was the collection of the amount of the execution in the notes of the Mississippi Union Bank, with the consent of the attorney-at-law of the plaintiff in error, who was the plaintiff in the execution, which consent was authorized by the plaintiff in error. The first ground relied upon as error was the refusal of the circuit court to rule out of the evidence testimony to the following effect, to wit: That the plaintiff, at the period of the collection of the amount of the execution in question, was in the habit of receiving in payment of debts due him Union Bank money, and did receive from one of his agents the sum of \$1500, and from another the sum of between \$4000 and \$5000; that from another of his attorneys-at-law, at the same period, he received collections in his favor in similar funds without objection, and that such funds constituted the currency of the country at that time, and were uniformly received by clients; and that the sheriff communicated information to the attorney of the plaintiff of the fact of his collecting the amount of the execution in Union Bank money, who received the information without any expression of disapprobation respecting the character of the funds collected. It is fully settled by this court, as well as elsewhere, that nothing short of the payment of the amount of a judgment in lawful money, that is, in the coin of the United States, is a satisfaction of an execution, unless the consent of the plaintiff in an execution permits a different satisfaction. The consent or acquiescence of a plaintiff in an execution to receive bank notes in satisfaction of his judgment, may be express or implied, and all facts and circumstances tending to show such consent, recognition, or acquiescence, may legitimately be allowed to go to a jury. The evidence complained of in this case, so far as it went, had a direct tendency to show the acquiescence of the plaintiff in the execution in the receipt of such funds in the payment of the debts due him, the one in question as well as others. The record shows also that the return of the execution was made at the December term, 1839, and the motion was not filed against the sheriff until the November term,

Anketell v. Torrey et al.

1843, an interval of nearly four years. In view of this fact, the evidence objected to was properly admitted, as showing an implied sanction by the plaintiff in the action of the sheriff upon the execution. The circumstances of this case are very like that of *Buckhannon et al. v. Tinnin et al.* 2 How. S. Ct. R. 258, wherein similar views of the law prevail.

It is hardly necessary to add that the court below did not err in refusing to charge the jury that there was no legal proof that the plaintiff authorized the sheriff to receive the Union Bank notes. According to the foregoing view of the law, such a charge would have been directly against the facts as presented by the evidence.

Judgment affirmed.

JOHN DOMINGES vs. THE STATE.

The substitution of depositions for oral testimony belongs to civil trials ; in no state of circumstances, under our constitution can a deposition of a witness be used against the accused in a criminal prosecution ; and a similar rule seems to hold as to depositions of witnesses in his favor, unless by his consent ; therefore where a prisoner makes an affidavit for a continuance, the state cannot force him into a trial by admitting the truth of what the alleged absent witness would depose to.

It seems that in criminal cases it should not be allowed or encouraged except in very extreme cases, to admit what the prisoner in his application for a continuance stated that he expected to be proved by absent witnesses ; but when such an admission has been once made, it constitutes an admission not merely that the absent witnesses would have sworn to certain alleged facts, but also that the facts alleged are absolutely true.

In error, from the Wilkinson circuit court ; Hon. Thomas A. Willis, judge.

John Dominges having been indicted for the murder of James H. Holmes, was tried and found guilty, at the April term, 1845, of the court.

On the trial, the defendant filed an affidavit for a continuance, in which he stated that Terry Haley, Benjamin L. Hodge and Alanson Ferguson were important witnesses, and absent ; that by Haley he would prove that he acted in self-defence in killing Holmes, and by the other witnesses, that the deceased had threatened his life, and went armed for the purpose of taking it. The district attorney stated that he would admit that if the witnesses named in the affidavit were present, they would swear to the truth of the facts deposed to therein ; upon which the circuit court compelled the prisoner to go into a trial, and he excepted.

After the evidence for the state was closed, and also that for the prisoner, which it is not deemed necessary to notice further,

the state introduced witnesses who testified that they knew Haley's general character for truth and veracity in the community in which he lived, and they would not believe him on oath.

When the testimony was closed, the prisoner's counsel asked the court to instruct the jury, "that the admissions of the counsel for the state, that the facts contained in the prisoner's affidavit for a continuance should be considered as sworn to by the witnesses therein named, was an admission of the truth of those facts, and that unless the jury can convict the prisoner of the charge in the indictment consistently with the admitted truth of those facts, they must find for the prisoner;" the prisoner also asked other instructions to the like effect, all of which were refused, when he prosecuted this writ of error.

Farish, for the prisoner, contended,

1. That the practice of allowing concessions in cases like the present, was novel, and not calculated to advance justice; but if encouraged, the prosecutor was bound to admit the truth of the facts proposed to be proved. He cited *The People v. Vermilyea*, 7 Cow. 388; *Brill v. Lord*, 14 Johns. 341; 7 Cow. 390; Grah. Pr. (2d ed.) 285, and authorities cited.

2. That the admission of the truth of what the witnesses would swear to, was also an admission of all that might fairly be deduced therefrom.

3. That even if Haley be impeached, yet what he deposed to, taken in connection with the testimony of Hodge and Ferguson as corroborating it, was entitled to be weighed by the jury. *People v. Vane*, 12 Wend. 78; 2 Phil. Ev. (Cow. & Hill Notes) 779.

John D. Fresman, attorney-general, contra.

Mr. Justice THACHER delivered the opinion of the court.

The plaintiff in error was indicted in the Wilkinson county circuit court, for the murder of one Holmes. Upon his being called to the bar for trial, he filed his affidavit for a continuance of the cause on the ground of the absence of material witnesses

in his behalf. This affidavit was in legal form, and set out that an absent witness, Haley, would prove that the accused acted in self-defence in the matter with which he was charged, and that absent witnesses, Hodge and Ferguson, would prove that the deceased, alleged to have been murdered by the accused, threatened to take the life of the accused, and went armed for that purpose. At the filing of this motion for a continuance, supported by an affidavit of the foregoing character, the state, by the district attorney, agreed to admit upon the trial, that if the witnesses named in the affidavit were present, they would swear to the truth of the facts deposed to therein. The motion for a continuance was overruled below, and an exception to that judgment taken by the accused. On the trial, the affidavit for the continuance was read to the jury, and it was admitted that if the witnesses named therein had then been present they would have sworn to the truth of the facts therein set forth. The state thereupon introduced witnesses to impeach the credibility of the said Haley, one of the witnesses named in the affidavit for a continuance. A number of instructions to the jury were requested upon the behalf of the accused, to the effect that the foregoing admission by the state, in reference to the testimony of the witnesses described in the affidavit for a continuance, was an admission of the truth of the facts therein set out, and that full weight to that extent should be given to them by the jury in weighing the evidence of the case. These instructions were refused by the court, and a verdict and judgment of guilty according to the indictment, were rendered against the accused.

The substitution of depositions for oral testimony belongs to civil trials. In no state of circumstances, under our constitution, can a deposition of a witness be used against the accused in a criminal prosecution, and a similar rule seems to hold as to depositions of witnesses in his favor, unless by his consent. The system of criminal jurisprudence appears to require the presence of the witnesses, both for and against the accused. Very often, in such prosecutions, much depends upon the appearance, manner and mode of testifying of a witness, and it is

this that adds the superior character and importance to oral testimony.

The practice in criminal cases of proposing to admit what was expected to be proved by absent witnesses, is not calculated to advance the ends of public justice; and if indeed regular and competent, should not be allowed or encouraged except in very extreme cases. But when such an admission has been once made, it constitutes an admission not merely that the absent witnesses would have sworn to certain alleged facts, but also that the facts alleged are absolutely true. Such an admission is an absolute concession of the facts stated by the accused upon his part, because that alone would be a fair substitute for what might have been the result of the evidence upon an oral examination of the witnesses whose actual presence was sought to be obtained.

Judgment reversed, and a new trial directed to be allowed by the court below.

NOVEMBER TERM, 1846.

Dillingham v. Jenkins.

7s	479
89	518
89	520

WILLIAM H. DILLINGHAM vs. WILLIAM JENKINS.

The obligation of the contract of a surety arises from the consideration received by his principal; and if the principal be bound the surety is also, unless there has been some variation in the terms of the contract; where therefore, a principal had, by promises to an assignee, induced him to purchase his and his surety's note, and thereby precluded himself from setting up a failure of consideration of the note as to the payee; *held*, that the surety was likewise precluded from making the defence.

In the case of the sale of the real estate of a deceased person, the record of the probate court must show that all the proceedings were regular, and that the citations were published according to law; such degree of strictness is not however necessary in the sale of chattels, which go to the administrator to be administered; in such case even though the record do not show that citations were published according to law, the sale will be valid; and that though it be a lease for ninety-nine years which is sold.

A lease for ninety-nine years is of no higher dignity than a lease or term for one year; both are mere chattels, and go to the administrator to be administered.

In error from the circuit court of Amite county; Hon. Van Tromp Crawford, judge.

William H. Dillingham sued William Montgomery and William Jenkins in an action of debt upon a bill single for \$5000. A trial was had, and verdict rendered for Dillingham for \$4052 48, and judgment given accordingly; that judgment, however, was reversed. A full report of the case and of the facts elicited on the first trial will be found in 3 S. & M. 647.

On the second trial, Montgomery having died, the cause was submitted to the jury as to Jenkins alone, and they found a verdict for \$702 59½, in favor of Dillingham.

On the second trial the testimony in substance was this:
The bond sued on was in these words:

"\$5000 00. On or before the first day of January, one thousand eight hundred and forty-one, we, or either of us, promise

Dillingham v. Jenkins.

to pay W. M. Taylor, or order, five thousand dollars, for value received of him; as witness our hands and seals, April 8th, 1839.

" William Montgomery, (seal).

" Attest, Jas. Jenkins, (seal).

" S. R. Davis. William Jenkins. (seal)."

Indorsed, "Pay the within to William H. Dillingham, and I am holden, as indorser, without demand and notice.

" Wm. M. Taylor."

Dillingham then read to the jury the answer of Montgomery to a bill of discovery filed against him; in which bill for discovery the plaintiff, among other things, alleged, that the defendant had urged him not to sue, and that, if he would not, he would pay the debt out of the crop of 1841, and that the plaintiff forbore to sue until April, 1841; in the answer to this bill for discovery, defendant Montgomery admitted that he wrote the following letter to the plaintiff: —

"Oakland Grove, April 14, 1840.

"Mr. Dillingham, — Sir: By the request of Mr. Taylor, I drop you a line, to inform you that the note which he holds on me is just, as it stands, with a credit on it, on the back of the note, and yet subject to another credit, of eighty-nine dollars and fifty cents; and that I consider the note good against me for the amount it calls for when due; and further, I expect to make satisfactory arrangements with the holder of the note when it falls due.

Yours, &c.

" William Montgomery."

He also admitted that the plaintiff had informed him of his purchase, and that he had expressed himself to the plaintiff as satisfied. He admitted that he had promised to apply the crop of 1841 to the payment of the note; that after the note became due, he asked the plaintiff not to sue, and then made the promise about the crop of 1841; and that the plaintiff refrained bringing suit until April, 1842; and that the above letter was written with reference to the note sued on; but that all these promises were made in the belief that Taylor had performed the consideration for which the note was given, which the respondent believed had not been done.

It was then proved by the defendant, that \$3000 of the bond was given for the purchase by Montgomery of a lease of a school section of land, being a sixteenth section, which Stephen H. Strong, in his lifetime, had leased for ninety-nine years, and to which the trustees of the school section had given him a bond to make him a title. Strong died, and his administrators applied to the probate court to sell the leasehold interest; the court ordered the sale; and the administrators sold it and reported the proceeds of sale to the court; but the records of the probate court did not contain any evidence of the publication of citation or notices to those interested in the land as required by the statute.

The administrators of Strong made a written assignment of the bond of the trustees, to the purchaser, Reuben H. Taylor, in which assignment they conveyed "all the right, title, and interest of the estate of the said S. H. Strong, deceased, and of us as administrators aforesaid," in the said sixteenth section of school lands, to Taylor.

Reuben S. Taylor on the bond, assigned and set over to William M. Taylor, "his heirs and assigns all my right, title, claim, and interest to the land described in the within and foregoing bond, made by S. H. Strong, and assigned to me by his administrators."

William M. Taylor, for the sum of \$3000, made a similar assignment to Montgomery.

After the defendant had closed his testimony, the plaintiff proved that Montgomery had been put in possession of the land, and had been in quiet possession until his title thereto was sold; and that his vendee had taken possession and been in peaceable and quiet possession ever since.

This was all the testimony; the plaintiff moved for a new trial, which was refused, and after the judgment was rendered, Dillingham prosecuted this writ of error.

Montgomery and Boyd, for plaintiff in error.

This is the same case which was before this court at a former term. A full report of it will be found in 3 S. & M. 656.

Since the decision in this court, Montgomery has departed this life, and that has produced the only change we can discover in the record.

The jury, on the second trial, found a verdict for Dillingham for \$702 59½. This could only have happened by allowing the defendant a credit on his note for the amount of the supposed value of the 16th section.

The opinion of the court in the report above referred to, settles that point and every other connected with the present controversy. Until that opinion is changed, Dillingham cannot be affected by any equities or assets existing between the makers of the note and the payee. The court therefore erred in not granting him a new trial.

There is a bill of exceptions, in the present record, taken to the admission of testimony during the trial, on which the plaintiff in error might safely rest his case. After he had adduced the answer of Montgomery to the bill of discovery, admitting the consideration of the note, and acknowledging the letter appended to the bill, it was not competent to introduce any testimony on behalf of the defendants, showing a different consideration or a failure of consideration. The defendants could not impeach their own admissions. And in admitting such testimony, the court erred. It is probable, from the finding of the jury, that this very ruling of the court produced the result, of which Dillingham complains. The jury must have thought that the consideration of the note, in part, was the absolute sale by fee simple title, of the 16th section, and not the mere bond for title, which was admitted by Montgomery. And under this impression they doubtless considered they had a right to deduct that part of the consideration from the amount of plaintiff's demand.

Their verdict, even on this view, was rather strange, because it was proved on this trial, though not on the former, that Montgomery had been let into possession immediately after his purchase, and had so remained till he had sold out his interest in this very section, and his vendee still remained in possession undisturbed, and without interference from any grantor. On

this first bill of exceptions, then, the case would seem as clear as on the second, which relates to the motion for a new trial.

J. M. Smiley, for defendant in error.

This case is, the defendant relies on a failure of consideration, for which the bill single was executed, as to the sum of \$3000, the price of the sixteenth section of land, in Township 3, of Range 3, east; because the order of the probate court of Amite county, granting leave to the administrators of Stephen H. Strong to sell said sixteenth section, was void for want of jurisdiction. The record of the probate court shows that no citation or publication was made, as required by law. *Campbell et al. v. Brown et al.* 6 How. 106; *Gwin et al. v. McCarroll*, 1 S. & M. 351.

The bond of the trustees of school lands for titles to Strong, could not be sold by the administrators of Strong, under an order to sell the land. And the transfer of the bond by the administrators was not a transfer of the land, but of a chose in action, which is not in accordance with law. The bond of the trustees of school lands to Strong was assigned by his administrators, not in payment of Strong's debts, or in distributing his estate, and is void.

The several assignments of the bond for titles are on detached scraps of paper; in unintelligible language, and therefore void for uncertainty. For this reason the consideration of the bill single as to the sum of \$3000 has failed.

But it is insisted that by the former decision of this case the defendant is precluded from setting up a failure of consideration. It is not controverted that the statements of Montgomery, the principal, (who is since dead, and not now a defendant,) to Dillingham, were sufficient to estop him from setting up a failure of consideration, but, with due deference to the previous opinion of the court, we deny that Jenkins, the security, is thereby estopped.

It is decided, in the case of *Hamer v. Johnson et al.* 5 Howard, that the statement of the maker of a note, that the note was good and would be paid, to a person about to purchase the

Dillingham v. Jenkins.

same, operated as a waiver of the defence; and the reason of the decision is, that such statements, made by the maker of a note to the purchaser, "would be a deceit upon him," and that he should not take advantage of his own wrong. The reason is clearly on the ground of fraud, perpetrated, either knowingly or ignorantly, on the purchaser of the note. It is contrary to law and good morals, to visit the consequences of fraud upon any other than the guilty. And it is therefore inconsistent with the principles of justice, morality, and law, that Jenkins, who answers that he was wholly ignorant of all the transactions between Dillingham and Montgomery, should be deprived of a valid and legal defence, by the fraud of Montgomery. The law will not permit the deceit of Montgomery to operate to the injury of Jenkins, any more than to the injury of Dillingham.

In the case of *Honore v. Dougherty*, 4 Bibb, 280, the statements of the security were held not to bind the principal: If the security in a case like the present could not bind the principal, it would seem reasonable that the principal could not bind the surety, especially if they are to be considered as joint contractors in law.

In the case of *Bell v. Morrison*, 1 Peters, 355, it is ruled that one partner can bind the others during the continuance of the partnership, but not after the dissolution of the partnership, on the ground that each partner is the agent of the others, but when that agency ceases, by the dissolution of the partnership, the promise of one will not bind the others, even in relation to partnership debts. In the same case Judge Story says, that the promise of one joint debtor will not take a case out of the statute of limitations, as to the others, and uses this forcible language: "If such a principle be correct," that one joint debtor can bind others, "the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt, at the time when such acknowledgment was made."

This decision of the highest judicial tribunal of the country is deemed conclusive.

Dillingham v. Jenkins.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This case is before us a second time, having been first brought up by the defendant below, against whom there was a verdict for \$4052. The judgment was reversed on account of an improper charge given by the court. On the same testimony a second jury rendered a verdict for the plaintiff for only \$702, and he now brings the case up on exceptions taken during the progress of the trial, and on exceptions taken to the decision of the court in overruling a motion for a new trial.

The action was founded on a writing obligatory, made by Montgomery and Jenkins, payable to William M. Taylor, and by him transferred by indorsement to Dillingham, who took the assignment after he had notified Montgomery that a negotiation for a transfer was on foot, and after having received assurances from Montgomery that the debt was justly due and should be paid, subject to certain previous payments. An effort was made on the trial to establish a failure of consideration, and it is presumable that on this ground alone the jury rendered a verdict for an amount so much less than that recovered on the first trial.

The history of the consideration is briefly this; Stephen H. Strong, in his lifetime, had leased for ninety-nine years a sixteenth section of land, which was appropriated by congress for the use of schools. He received no other evidence of title than a bond from the trustees of school-lands to make him a title. After Strong's death his term in this land was sold by order of the probate court, and Reuben Taylor became the purchaser, and took from the administrators an assignment of the bond which had been given to Strong. Reuben Taylor sold the land, and assigned the bond to William M. Taylor, who sold to Montgomery for \$3000, and assigned the bond to him; Montgomery executed the note sued on, with Jenkins as surety, in which is embraced the amount of purchase-money, besides some other consideration, amounting in the whole to \$5000, about \$1500 of which had been paid before the transfer to Dillingham. It seems that Montgomery took possession of the land, and has held it ever since, without molestation.

In order to show failure of consideration, witnesses were examined to prove the declarations of Taylor, the payee, that part of the consideration of this note, was the sixteenth section, which Montgomery had purchased. This testimony was objected to. In the former decision, (3 S. & M. 647,) we had occasion to examine fully the effect of Montgomery's declarations to Dillingham, before the assignment was taken, and we then decided, on the authority of our previous decisions, that Montgomery had waived any failure of consideration, and could not be permitted to set up such a defence, after having induced Dillingham to take the assignment. But Montgomery has died since, and Jenkins is now the only defendant. It is insisted that he is a mere surety, and is not precluded by the declarations of Montgomery from setting up failure of consideration. The consideration of a contract does not pass to the surety. His obligation arises from the consideration received by his principal. The contract of a surety is accessory to the contract of his principal, and if the principal be bound the surety is also, unless he is discharged by some variation in the terms of the contract; but if there is no change in the risk he took upon himself, he is not discharged. The effect of Montgomery's admission was, that he had received a consideration, or if he had not, he waived any objections on that score, and admitted the validity of the contract. The obligation of Montgomery was the inducement to the surety, and we cannot perceive how the surety can avail himself of a want of consideration, when his principal cannot. In suretyships there is a contract between the principal and his surety. Montgomery is still bound on this contract to Jenkins, as well as on the original obligation. We do not think, therefore, that the admission of Montgomery had the effect to bind Jenkins. The validity of Montgomery's contract is what binds him. If this view of the subject be correct, all evidence which went to impeach the consideration of the note was improperly admitted. But conceding that this is a doubtful point, the question is, did the defendant succeed in proving a failure of consideration? He relies upon a supposed defect in the proceedings in the probate court, in granting an

Dillingham v. Jenkins.

order to sell the land, without proof that citations had been published according to law. It is true that in such cases the record must show that the law has been strictly pursued when land is sold by an administrator. But we have never decided that such a degree of strictness was necessary in the sale of chattels, which go to the administrator to be administered. The thing sold was a term for years, which is a chattel and goes to the administrator, and not to the heir. It must be distributed as personal property. A lease for ninety-nine years is of no higher dignity than a lease or term for one year. The consequence is, a failure of consideration was not established, and a new trial ought to have been granted.

Judgment reversed, and new trial awarded.

BENJAMIN WILLIAMS vs. F. L. CLAIBORNE et al.

The recital in the premises of a deed is important ; as its office is to explain the motives and reasons upon which the deed is founded.

The marital rights of the husband to the property of his wife, cannot be defeated, unless an intention be clearly expressed that the property is to be held for the separate use of the wife ; nothing is to be implied against him.

The main object of a deed, is to be gathered from its provisions ; and when that is ascertained, it must prevail ; and a proviso or condition repugnant to the grant if the grant be specific, is void ; but if it be not specific, the proviso or condition does not defeat it ; and a proviso which is only explanatory, is good.

Where property was conveyed in trust, and one declaration of trust was in conflict with, and repugnant to the premises, recital, the *habendum*, and every other declaration of trust, the former must yield and be rejected.

W. (in debt) and H. (possessed of large property) being about to marry by deed of settlement before the marriage, convey to a trustee for H's *sole and separate use, all her property, and the interest, income and proceeds thereof on trust.* 1. For the use of W. and H. *for their natural lives*, subject to disposal by H. by will. 2. That H. should have during her life, full control over the property, and that it should not be subject to W's debts or his control. 3. That the trustee might sell when requested : *Held*, that W. on the death of H. had no right in the property thus conveyed, or to a participation in the proceeds, income, or profits of it.

Where in one clause of a deed of marriage settlement, between W. and H., the property was settled in trust for the use of W. and H. for their natural lives, and W. covenanted in the deed, that the whole property and its proceeds, should belong to H. for her sole and separate use ; *held*, that he was estopped by his covenants from setting up any claim to the property on the death of H.

APPEAL from the superior court of chancery ; Hon. Robert H. Buckner, chancellor.

Benjamin Williams, filed his bill, setting forth that in November, 1836, being about to intermarry with Jane Hoggatt, they mutually united in a deed of marriage settlement.

The following are such portions of the deed as it is deemed necessary to publish, viz :

"This indenture of three parts, made this tenth day of November, in the year of our Lord one thousand eight hundred and thirty-six, between Benjamin Williams, of the county of Madison and state of Mississippi, of the first part; and Jane Hoggatt, of the county of Adams, and state aforesaid, of the second part; and F. L. Claiborne of the county of Adams, and state aforesaid, trustee as hereinafter mentioned, of the third part: whereas, a marriage is intended to be had and solemnized between the said Benjamin Williams and the said Jane Hoggatt, and it is their intention to assign and secure to the separate use and disposal of the said Jane Hoggatt, all and every part and portion of her real and personal property, of what kind soever, and thereby not only to make a certain, liberal, and sure provision for her support and maintenance, but also to secure to her own separate use and disposal all her real and personal property aforesaid; and whereas her property, real and personal, does and will consist in such sums of money and other personal property, and of such real property, as she, the said Jane Hoggatt, does now possess, and of such property as she may hereafter obtain by purchase, descent, devise, gift, or otherwise; and whereas it is agreed by and between the said Benjamin Williams, and the said Jane Hoggatt his intended wife, that all her said property that she now does possess, or may hereafter in due course of law become entitled to, shall be assigned to the said F. L. Claiborne, trustee as aforesaid, to hold upon such trusts as are hereinafter named, mentioned, and provided respecting the same.

"Now this indenture witnesseth, that the said Benjamin Williams, and Jane Hoggatt his intended wife, for and in consideration of the said intended marriage and of the trust hereinafter mentioned, and of five dollars to the said Williams, in hand paid (the receipt of which is acknowledged,) have granted, bargained, sold, delivered, and assigned, and do hereby, &c., unto the said party of the third part, all the estate, right, title, interest, claim, and demand whatsoever, of the said

Jane Hoggatt, of, in, and to all the lands, tenements, and premises whatsoever, which she may now possess, or hereafter may possess and hold by gift, devise, or descent, or in any manner whatever; and also all sums of money, goods, chattels, rights, credits, or personal property of any description whatever, which she either now possesses, or to which she may be hereafter entitled in any manner whatsoever; *to have and to hold, &c.*, upon the following trusts, to wit:

"First. That the said trustee or his successors shall hold the said property, real and personal, to the use, benefit, and behoof of the said Benjamin Williams and Jane Hoggatt, for and during the term of their natural lives, and after their death, to the use of the heirs of the body of the said Jane Hoggatt, by the said Benjamin Williams to be begotten; and, in default of such heirs, then to the right heirs of the said Jane Hoggatt; subject, nevertheless, to such last will and testament of the said Jane Hoggatt, hereinafter provided for and mentioned.

"Secondly. And upon the further trust and confidence, that during the lifetime of the said Jane Hoggatt, she shall at all times have the full and complete control of her said property, real and personal, as aforementioned, and that the said Benjamin Williams shall not intermeddle therewith; and that the same or any part thereof shall not be liable to his control, debts, or disposal, and under the control of the said Jane Hoggatt, or of the said trustee, under her direction.

"Thirdly. And upon the further trust and confidence, that the said trustee or his successor, &c., shall and will, upon the reasonable request of the said Benjamin Williams and Jane Hoggatt, and at the wish of the said Jane Hoggatt, in writing, under her hand and seal, and duly acknowledged, bargain, sell, &c., unto such person, &c., as the said Benjamin and Jane may appoint, all or any of the said real and personal estate, &c.

"And the said Benjamin Williams, for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said F. L. Claiborne, &c., that the property, real and

personal, assigned as aforesaid, and the interest, and income, and proceeds thereof, in all respects whatever, shall be for the sole and separate use, benefit, and disposal of the said Jane Hoggatt, the said marriage notwithstanding; and that the same shall not be subject to the control, direction, or disposition of the said Benjamin Williams, or liable for his debts."

By the other provisions of the deed, it was stipulated, that Jane Hoggatt might receive and dispose of any part of the property, as she desired, during the coverture, in any manner she might choose: that if she survived her husband, or if a divorce *a vinculo matrimonii* took place, all the undisposed of effects in the hands of the trustee should "be at her entire, separate, and sole disposal and control:" that she might, by her last will and testament, dispose of all the property, real and personal, with the interest, income, and proceeds, according to her pleasure.

The trustee by the deed accepted the trusts, and covenanted to account "from time to time with the said Benjamin Williams and Jane Hoggatt," &c., and also not to waste the trust property.

It was further stipulated, in the conclusion of the deed, that if the trustee died, resigned, or refused to act, the probate court of Adams county should appoint a successor.

The covenants in the deed on the part of Williams, were in these words:

"The said Benjamin Williams for himself, his heirs, executors and administrators, further covenants and agrees to, and with the said Jane Hoggatt, and to, and with the said F. L. Claiborne, trustee as aforesaid, and his successors, hereinafter provided for, that the said Jane Hoggatt, at any time during her life, shall and may have power to make an appointment, testamentary in writing, will and codicil, and therein and thereby to appoint and name the person or persons she may think proper to have, receive, and be entitled to said real and personal property, as aforesaid, together with the interest, income and proceeds thereof; and that the said Jane Hoggatt, shall and may dispose thereof, to wit, of all, or any part of

her said real and personal property, which she now possesses, or may hereafter become entitled to; and that by virtue of such testamentary appointment, will or codicil, it shall and may be lawful for such person to receive the same, and to discharge the said trustee, &c."

As the questions presented in this case turn exclusively on the construction of this deed, it is only necessary briefly to refer to other facts. The marriage took place immediately after the due execution of the *ante nuptial* agreement; but the honey-moon was scarcely over before a separation took place, and the wife removed to Louisiana to reside with her brothers. In February, 1838, the complainant exhibited his bill against the trustee in the deed, praying a decree against him, for one-half of the annual profits accruing from the estate embraced in the deed. Mrs. Williams soon afterwards, and before a decree rendered on that bill died, having disposed of all her separate property by last will and testament to her nephews and nieces. The complainant then filed a bill of revivor and supplement, making the legatees and executors under the will parties defendants. The new parties thus brought in demurred generally to the bill; and the chancellor on argument, sustained the demurrer, and dismissed the bill. His opinion will be found reported in 1 S. & M. Ch. Rep. 355.

The complainant appealed from the decree.

Jennings, Foote and *Hutchinson*, for appellant, contended,

1. That the provisions in a deed, repugnant to its main object were void; for the first conveyance and the last testament were to prevail; 1 Vern. 343; Noy's Maxims, 3, 4; 2 Blackstone, 379, 380, 381; 1 Shep. Touch. 87, 88; Bacon's Abr. Tit. Grant I.

2. That by the 24th section of our statute on real estates of June 13, 1822, How. & Hutch. 348, an estate tail, other than that therein permitted, is converted into a fee simple in the donee; at the date of the deed, the grantor had no living heir as the issue of herself and Williams, and the first limitation in remainder was inoperative, but as the alienative clauses

attempted to create an entail failed, an estate in fee in the donee was the result. How. & Hutch. 349, sect. 28; Ib. 357, sect. 59.

3. If there be any doubt about the true construction of the deed, it must operate in favor of the husband, for the doctrine is that the conveyance must clearly show, that the property is to be for the separate use of the wife, otherwise the marital rights will attach. Equity will not deprive him, unless it be clear he was not to derive any benefit from it. 5 Vesey, 516; 2 Rep. 163; 4 Dessaus. 456; 1 Yates, 432; 3 Vesey, 166.

4. Regarding Mr. Williams as the grantor, the rule is, that the grant is to be taken most strongly against the grantor, and the repugnant provisions are void.

Montgomery and Boyd, for appellees.

The facts in this case, so far as necessary to a decision, are contained in the first volume of Smedes and Marshall's Chancery Reports, page 355. Neither party desires to raise any technical point, but desire the opinion of the court upon the true construction of the marriage agreement, or conveyance to Claiborne. We think the principle settled by the chancellor correct, and properly applicable to the rights of the parties. The authorities cited in defendant's brief, together with those alluded to by the chancellor, are direct and explicit. Nothing can be clearer, than that the special intent will control the general expressions in a deed or will. Words will be rejected, even to effectuate the special intent. *Dormer v. Parkhurst*, 3 Atk. 135; 1 Stra. 1105; *Bagshaw v. Spencer*, 2 Atk. 570; *Dovan v. Ross*, 3 Bro. C. C. R. 27.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This bill was filed by the complainant to recover of the trustees of his wife's property; one half of the yearly profits of that property. Prior to the marriage, the wife by deed in which the husband joined, conveyed to a trustee for her separate use, all her property of every description. The complain-

ant's right must depend alone on the construction which is to be given to the deed, which is the only question in the case. The late distinguished chancellor seems to have considered the case with his usual ability, and made a decree against the complainant, from which he has appealed.

The deed commences by reciting that a marriage was intended, and that it was the intention of the contracting parties "to assign and secure to the separate use and disposal of the said Jane Hoggatt, all and every part and portion of her real and personal property, of what kind soever, and thereby not only to make a certain, liberal, and sure provision for her support and maintenance, but also to secure to her own separate use and disposal, all her real and personal property aforesaid; and whereas her property, real and personal, does and will consist in such sums of money, and other personal property, and of such real property as she the said Jane Hoggatt, does now possess, and of such property as she may hereafter obtain by purchase, descent, demise, gift, or otherwise; and whereas it is agreed by, and between the said Benjamin Williams, and the said Jane Hoggatt, his intended wife, that all her said property that she now does possess, or may hereafter in due course of law become entitled to, shall be assigned to F. L. Claiborne, trustee as aforesaid, to hold upon such trusts as are hereafter named, mentioned, and provided respecting the same." It is important that this recital in the premises of the deed should be noted, inasmuch, as its office is to explain the motives and reasons upon which the deed is founded. *Cruise on Real Property*, title, Deed, 317. And for that purpose the recital is useful. *Sheppard's Touchstone*, 76. Taking this recital then as the key to the intention and motives of the parties, it is clear beyond doubt that Mrs. Hoggatt intended to secure to herself everything which she then possessed, or might afterwards acquire. The recital not only explains the intention, but it indicates with certainty the property to be secured by specifying particularly of what it consisted, and it embraced everything that she then had, or might acquire; not only that she might have a "liberal and sure support," but to secure the

whole to her separate use. By the *habendum*, all her lands, goods, chattels, rights, credits, money and personal property of every description, were conveyed to the trustee, upon the trusts thereafter declared, the first of which was that the trustee should hold the property to the use of the said Benjamin Williams and Jane Hoggatt, for and during their natural lives.

But the deed also contains further specific declarations of trust. The second provided that during the life of Jane Hoggatt, she should at all times have the full and complete control of all the property conveyed, and that Williams should not intermeddle therewith; and that it should not be liable to his control or disposal, or for his debts, but that it should be under the control of the said Jane, or the trustee under her direction.

The third provided that the trustee might sell if required in writing to do so. Then follows a covenant of Williams, that the property assigned, and the interest, income and proceeds thereof should be for the sole and separate use and benefit of the said Jane, and that it should not be liable to the control or disposition of Williams, or liable for his debts; and a further covenant that said Jane, by a demand in writing under seal, and attested, might receive from the trustee any part of the property, or the income, or proceeds, and to dispose of the same as she might think proper. The deed also contained further provisions, all indicating clearly, that Mrs. Hoggatt was to have the entire interest in the property and income, and lastly she reserved a power to dispose of it by will, which she did, and has died since the institution of this suit.

We concur fully with the counsel for complainant, that the marital rights of the husband cannot be defeated, unless an intention be clearly expressed that the property is to be held for the separate use of the wife. Nothing is to be implied against him. This is the rule laid down by the authorities, and is one which we have heretofore recognized. Another rule invoked for complainant is, that provisions in a deed repugnant to its main object, are void. The main object of a deed, is to be gathered from its provisions, and it will depend upon the deed

itself, which is its main object; when that is ascertained it must prevail. The rule goes thus far; a proviso or condition, repugnant to the grant, is void, provided the thing be specially granted. But if it be not specially granted, the proviso or condition does not defeat it. And a proviso which is only explanatory is good. Bacon's Abridgment, title Deed.

It is under the first declaration of trust that complainant claims half the profits of the estate. By this it is said the property was conveyed to the trustee for the use and benefit of Williams and Mrs. Hoggatt for life, and that this is the controlling clause of the deed, which cannot be defeated by anything which follows it. If this be true, the complainant is as much entitled to the whole of the property and the proceeds for life, his wife having died, as he is to half the profits. This clause contains no conveyance of the profits, except in general terms.

This is not the granting part of the deed. It is but one amongst several declarations of trust, and cannot be entitled to more weight than the succeeding trusts. If it does not harmonize with the succeeding trusts, then we must look at the whole instrument, and conform to what was manifestly the intention of the contracting parties. It is true, that this clause is not altogether reconcilable with the other parts of the deed, but all the other parts harmonize together. This is repugnant to the rest. Which is to prevail? Are we to take one declaration of trust, and make it control the premises and recital, the habendum, and every other declaration of trust, or is it to yield to the other parts? According to the rule already laid down, we shall be compelled to reject this clause. It is not a special grant, and must therefore yield to the subsequent express clauses or conditions. The construction is to be made on the entire deed; every part ought, if possible, to take effect. And if certainty once appears in a deed, that must be referred to as explanatory of what is indefinite. Cruise, title Deed, 293, et seq. When there are words in a deed, that evidently appear repugnant to the other parts of it, and to the general intention of the parties, they will be rejected. *Ib.* 296. If language is capable of expressing anything beyond doubt, this deed certainly does show

that it was the intention of Mrs. Hoggatt, and of Williams, that she should hold the whole property and its proceeds to her separate use; that Williams was to have no interest whatever in it. His covenants show this beyond the possibility of a doubt, and if they are useful for no other purpose, they certainly may be consulted to prove his intention. But we may here ask, why he is not bound by them? We know of no reason. They were made in view of marriage, and that is a sufficient consideration. But we are asked to follow that rule of construction which prefers the first clause in a deed. If we take this, it excludes the complainant. The clause on which he relies is in the middle. The intention is very fully and clearly expressed before and after the clause that is said to convey to him. Altogether, we think the intention and objects of the deed so clearly expressed as to leave nothing to implication. The marital rights of the husband are defeated by a clear intention expressed with certainty. We also think that the clause under which complainant claims, must yield, inasmuch as it is repugnant to all that precedes and follows it. It is at most but a general declaration of trust, liable to be controlled by the more specific declarations.

The decree is affirmed.

JOHN D. SCOTT, Administrator *de bonis non* of Johnson Silverberg, deceased, *vs.* CHARLES J. SEARLES, WILLIAM LAUGHLIN et al.

The transfer of a note, due to an estate by the administrator, in payment of his own debt, gives to the assignee, with notice, no right of recovery.

If a note given to an administrator for the purchase of personal estate of the decedent, be transferred by the administrator, in payment of his own debt, a subsequent administrator, the first having resigned his office, may file a bill in equity to enjoin the collection of the note by the assignee; and the chancery court having entertained jurisdiction to aid in the execution of the trust imposed on the administrator, and to prevent the multiplicity of suits, may grant relief, and direct the note to be given up to the acting administrator.

On appeal from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

John D. Scott, administrator *de bonis non* of the estate of Johnson Silverberg, filed a bill in the superior court of chancery, against Charles J. Searles, William Laughlin, Sarah Silverberg, Thomas Jones, William G. Meredith, and his wife Martha Meredith, Margaret Stovall, William C. Stovall, Newton Stovall, Sarah Jane Stovall, Jasper Stovall, Brittain Stovall, and Henry Stovall, the said William C., Newton, Sarah Jane, Jasper, Brittain and Henry, being children of Louis Stovall, deceased.

The bill charges that Johnson Silverberg died about the 6th of November, 1838; that Charles J. Searles and Michael Vanderherst, took out letters of administration on his estate; that Vanderherst died in the fall of 1839, and Searles acted as surviving administrator until the May term, 1841, of the probate court of Madison county, when he resigned his letters; that Searles and Vanderherst, by order of the probate court, sold the personal estate of the said Silverberg, at public sale, on the 4th of February, 1839; that at such sale, Sarah Silverberg bought

property to the amount of \$4178 21, for which she, with Louis Stovall and Thomas Jones, gave their bond, payable to the said administrators, twelve months after date; that Stovall has died since the bond was given, and there is no administration on his estate, the first administrator, Meredith, having resigned in July or August, 1843. The bill further states that Searles has fraudulently assigned said bond to William Laughlin, and that said assignment was without authority, contrary to law, and for the private benefit of Searles and Laughlin; that Sarah Silverberg and Thomas Jones are, to all appearance, insolvent; that complainant is not certain whether Jasper Stovall is of age or not, and that there is not, and never has been any guardian to the minor children of Louis Stovall; that William Laughlin has brought suit on said bond for the whole amount thereof, in the circuit court of Madison county, which is still pending and undetermined; that the Commercial Bank of Natchez has illegally and fraudulently issued a garnishment on a certain judgment recovered by said bank against Charles J. Searles, as surviving administrator of said Silverberg, for \$2175 99, requiring the said Sarah Silverberg, Thomas Jones, and one Alfred T. Moore, the attorney of said William Laughlin, to answer thereto, and discover what they owe to said Charles J. Searles, administrator of said Johnson Silverberg, or what effects they have in their hands, belonging to said administrator or said estate; that said judgment of said Commercial Bank, and other judgments of said bank against said administrator, Searles, obtained at the same time, were by fraudulent and illegal agreement between said bank and Searles, suffered by default, on false and pretended claims; that there is a fraudulent agreement between Searles, Laughlin, and the bank, to convert and appropriate the sum of money, owing on said bond, to their own purposes; and for this they are working into one another's hands; and that the bank issued said garnishment for an amount to suit their fraudulent intents, though there were other judgments which had also been fraudulently obtained by said bank against said administrator, Searles, to about the amount of \$20,000, and though the sum due on said bond, was \$4178 21, with interest thereon from the 4th of February, 1840.

The bill further states that in July last, the complainant filed a declaration, in the Carroll circuit court, on said bond, against the said Meredith, as administrator of Louis Stovall, but that about that time, Meredith resigned his letters of administration on Stovall's estate. The bill charges that the Commercial Bank is insolvent, and that said Searles and his securities on his administration bond, are also insolvent, and that Laughlin is a non-resident, and it is not known whether he is solvent or not. The bill also states that there is a large amount of the personal estate of said Louis Stovall, and makes an exhibit of the inventory thereof, made by the administrator.

The bill prays that Searles and Laughlin discover for what consideration, and at what time said bond was assigned, and, if in payment of a debt, who were the parties, debtor and creditor, and how such debt was originally created, and all about it; that the Commercial Bank of Natchez discover why she did not issue her garnishment for the whole amount of said bond; and that she state the whole indebtedness at any and all times of Silverberg, Searles, and of the firm of J. Silverberg & Co. and how much was paid to said bank by them at any and all times, and how much of the effects and debts of said J. Silverberg, J. Silverberg & Co. and a certain firm of M. Vanderherst & Co. said bank has received from the said Searles, and all assignments made to said bank by said Searles in his own right, and as administrator, surviving partner of any and all firms or otherwise; and whether there was not an agreement between said bank and Searles that the judgment upon which said garnishment issued, should be obtained by default. The bill also prays that Margaret Stovall discover the ages of her infant children.

The bill also prays that Laughlin be compelled to deliver up the bond, and the assignment made thereof by Searles to Laughlin, be cancelled; that Sarah Silverberg and Thomas Jones be decreed to pay complainant the full amount of said bond, and if they cannot be made to pay the same, that the property of Stovall's estate may be sold and applied to the payment of said bond, and that a receiver be appointed of the pro-

fits of Stovall's estate, and for an injunction against Laughlin, to stay further proceeding at law, in said suit of *William Laughlin v. Sarah Silverberg* and *Thomas Jones*, on said bond, and against the Commercial Bank, from proceeding further on said garnishment.

The answer of Charles J. Searles, admits the death of Silverberg, at the time stated in the bill; that he and Vanderherst were the first administrators of Silverberg's estate; that Vanderherst died, and he resigned his letters of administration, at the time stated in the bill; that they as administrators sold, at public sale, by order of the probate court, the personal property of said estate, on the 4th day of February, 1839; and that at such sale, Sarah Silverberg purchased property to the amount of \$4178,50, for which she, with Louis Stovall and Thomas Jones, gave their bond, payable to said administrators, twelve months after date.

That he assigned the bond to Laughlin, but denies that it was fraudulently done; and states that upon the final settlement of his administration of said estate of Silverberg, he accounted to the probate court for all the personal estate of the said Silverberg, which had come to his hands, except a balance of \$3571 57; that upon such final settlement, he was allowed by the probate court the sum of \$1006 38, for his services as administrator, which allowance reduced the said balance to \$2565 19, leaving still due and unpaid the said bond of Sarah Silverberg and others of \$4178 50, and upon which, after deducting said balance of \$2565 19, there would remain due to him the sum of \$1563 02, to secure which, he insists he had a legal right to retain any assets of said estate then in his hands; that the said bond of Sarah Silverberg and others, being the only assets then in his hands, and being indebted, as surviving partner of J. Silverberg & Co. and Searles & Vanderherst, to the said Laughlin, he, a short time previous to his final settlement with the probate court, assigned said bond to Laughlin, in part payment of such indebtedness, subject, however, to the payment to legal representatives of the estate of Silverberg, from the proceeds of said bond when collected, of the balance of

\$2565 19, due said estate; that said bond was retained by him, subject to the aforesaid conditions.

The answer admitted that Laughlin had instituted suit for the whole amount of the bond, and was then prosecuting the same in the Madison circuit court. Respondent was ignorant of the garnishment of the Commercial Bank of Natchez against Sarah Silverberg, Moore and Jones, and of proceedings thereon he knows nothing; he denied that the judgments of the Commercial Bank of Natchez against him, as surviving administrator, under one of which said garnishment was issued, were fraudulently obtained, or were obtained on false and pretended claims against said estate; denies fraudulent combination and mal-appropriation, and states ignorance of the suit, instituted by complainant, against Stovall's administrator.

Mr. Laughlin answered, admitting that Silverberg died in the fall of 1838; that Searles and Vanderherst first took out letters of administration on his estate; but he knew nothing of Vanderherst's death, Searles's resignation, of the sale of the personal property of Silverberg's estate, and of the purchase of any of said property by Sarah Silverberg; he denied that Searles fraudulently assigned the bond in complainant's bill, mentioned to him, and stated that in the spring of 1841, Searles informed him that he, Searles, had assigned to him, and placed in the hands of his attorney, A. T. Moore, for collection the said bond; that said assignment was made subject to the payment of \$2565 19 to the legal representatives of the estate of Silverberg, from the proceeds of said bond when collected; and that at the time said assignment was made, Searles, as surviving partner of the firms of J. Silverberg & Co. and Searles & Vanderherst, was indebted to him, and the assignment was made to secure the payment of that indebtedness; he denied collusion in said assignment, or any fraud of which he was cognizant.

Respondent admitted that he instituted suit on said bond for the whole amount thereof, but denied that such suit was instituted for the purpose of recovering and appropriating to his own use any other portion than the remaining proceeds of said bond, after the payment of said sum of \$2,565 19 to the legal repre-

sentatives of Silverberg's estate; of that sum he admitted himself a mere trustee, and held himself at all times amenable to the orders of this court in relation thereto; and stated his willingness to surrender said bond to the complainant upon his paying or securing the payment of the balance due on said bond, after deducting the said sum of \$2,565 19.

As to the judgments of the Commercial Bank of Natchez against Searles as surviving administrator, the garnishment issued thereon, and all the proceedings under the same, respondent was wholly ignorant; he denied all combination and fraudulent appropriation, and that he was a non-resident.

The defendants entered a motion to dissolve the injunction upon the bill and answers of Searles and Laughlin, which motion the chancellor sustained, and ordered the injunction to be dissolved; from which order the complainant prayed an appeal to this court.

Samuel Scott, for appellant.

That the bond or note under seal, the subject of suit, could not be legally assigned by Searles to Laughlin for the purposes stated in their answers, I think palpable upon many grounds.

1. The bond being payable on its face to Silverberg's administrators, was notice to Laughlin that it belonged to the estate of Silverberg. *Miller v. Helm*, 2 S. & M. 687.

2. An assignment with or without notice, when made by an administrator for such purposes as stated in the answers of these defendants, cannot be sustained or sanctioned by law. *Prosser v. Leatherman*, 4 How. R. 240; *Miller v. Helm et al.* 2 S. & M. 687. See also on this point, *Briscoe v. Thompson*, Freeman's Ch. Rep. 155.

3. "Such an assignment, changing the rights of the parties, cannot be sanctioned in law, and thus far countenance an illegal contract." *Prosser v. Leatherman*, 4 How. R. 240.

4. The assignee, Laughlin, having taken the bond after the same became due, took it subject to all liabilities and equities existing against it. Chit. on Bills, 244, 9th Am. from 8th Lond. edit.; *Taylor v. Mather*, 3 Term Rep. 83, in note; *Brown v.*

Scott v. Searles et al.

Davis, 1b. 80; *Rothschild v. Comey*, 9 Barn. & Cres. 391; *Burrough v. Moss*, 10 Ib. 558.

5. Again: We have shown, as we think, that Searles could not assign the entire bond or the whole sum due thereon by the above authorities, for the purposes stated in the answers. Neither could a part of the bond be assigned by him; for there is no better settled principle than that a part of a contract cannot be assigned, 5 Wheat. R. 277; *Mandeville v. Welch*, 3 Kent's Com. 89; Chit. on Cont. 483 (note 1); 1 Pirt. Dig. 41. See 24 Ib. 178; *Douglas v. Wilkeson*, 6 Wend. 637; 1 Bibb, 178; *Gibson v. Cook*, 20 Pick. 15; *Robbins v. Bacon*, 3 Greenl. 346.

6. But again: The bond being of itself notice to the party taking it, he was guilty of fraud by knowingly assenting and coöperating with the administrator in a breach of trust in taking an assignment of the bond. *Miller v. Helm*, 2 S. & M. 687; *Prosser v. Leatherman*, 4 How. 240; 2 Williams on Ex'rs. 612, and authorities there cited; *Graff v. Castleman*, 5 Rand. 195; *Dodson v. Simpson*, 2 Ib. 294; *Field v. Scheffelin*, 7 John. Ch. R. In the above stated case of *Miller v. Helm*, this court says, "as the administrator cannot appropriate such paper to the payment of his own debts, or to a purchase of property for himself without a violation of his duty, the indorsee who takes it for such purposes, knowing that it is a part of the assets, is a participant of the fraud, and cannot be allowed to profit by it."

7. The administrator, Searles, could not be a purchaser from himself either immediately or by means of a trustee. 2 Williams on Ex'rs. 613; *Watson v. Tbon*, 6 Mad. R. 153. See 1 Mad. Ch. 111 to 114, and authorities there cited.

All advantage made by the trustee enures to the benefit of the *cestui que trust*.

Mr. Justice CLAYTON delivered the opinion of the court.

This is an appeal from an order of the superior court of chancery, dissolving an injunction. The facts, so far as the point now before the court is involved, are briefly these: The defendant, Searles, and one Vanderherst, now deceased, became the

administrators of the estate of Johnson Silverberg, deceased. At their sale of the personal estate of the decedent, his widow purchased property to the amount of more than \$4000, and executed her note with sureties payable to the administrators. Vanderherst died; Searles continued to act as administrator until May, 1841, when he settled his account and resigned. The note of Sarah Silverberg is still unpaid, and it was assigned by Searles to his co-defendant, Laughlin, in payment of a debt of his own, whether before or after his resignation, does not distinctly appear.

The bill was filed by the administrator *de bonis non* of Silverberg, for the purpose, among others, of restraining the collection of the note by Laughlin, and of having it delivered up to the complainant. There are a great many other parties, and a great variety of incongruous objects in the bill, but with these we have at present no concern. The chancellor dissolved the injunction, from which order this appeal was taken.

In *Prosser v. Leatherman*, 4 How. 240, the court decided that a transfer of a note due to an estate, by the administrator, in payment of his own debt, gave no right of recovery to the assignee with notice. In *Miller v. Helm*, 2 S. & M. 695, the court said: The note has been improperly transferred, and the complainant seeks its restoration, together with a foreclosure of the mortgage, for which last purpose at least, chancery is the proper forum." The case of *Stubblefield v. McRaven*, 5 S. & M. 130, was in many of its features very much like this. The court said, if McRaven (who was the first administrator,) is proceeding to collect debts, which properly belong to the estate, he may be prevented, as the law substitutes complainant to all rights which may be necessary to prosecute for claims against the estate."

The fair inference from these cases is, that the complainant had a right to the injunction in this cause, and that it was improperly dissolved. The right of a court of equity to compel a delivery of the note is apparently less clear. In *Miller v. Helm* this point was waived.

The assets of an estate constitute a trust fund for the payment of debts and legacies, or distributive shares. Each suc-

cessive administrator is a trustee. If it be necessary for the administrator *de bonis non* to come into equity, to preserve the fund from waste, the court, in order to aid in the execution of the trust, and to prevent multiplicity of suits, may finally dispose of the case, and give relief.

In this case Searles claims an interest of about one-third in the note, on account of what is due him from the estate, and asserts a right to retain to that extent.

A cause of action is entire, and cannot be severed. A part of a note cannot be transferred, so as to give right to sue for such part. The complainant, therefore, has a right to the note, that he may proceed to collect it. Yet the chancery court should make such order as will protect the interest of Searles or his assignee. The rights of all may be thus preserved.

Nothing but the order dissolving the injunction was appealed from, we are consequently confined to that order. The same is hereby directed to be reversed, the cause remanded, and the injunction retained until the note is delivered to complainant.

What further order may be necessary in regard to other parties, and other objects of the bill, we do not now undertake to say.

Decree reversed and cause remanded.

LEWIS SMITH vs. JORDAN ELDER, use of Edward Francis.

Where a demurrer was filed to a plea and the record did not state in so many words, that the demurrer was sustained; but it appeared in the record that the defendant, under a judgment of *respondeat ouster*, plead again; *Held*, that the record showed sufficiently that the demurrer had been sustained.

Where pleas were filed on which issues were taken, and another plea to which a demurrer was sustained, and on a judgment of *respondeat ouster*, the defendant plead a similar plea, to which a like demurrer was filed, of which last demurrer the record shewed no disposition, but the parties went to trial on the issues made up; *Held*, that under the circumstances, this court would presume that the parties waived this last demurrer.

Where a suit was brought in the name of one for the use of another, the nominal plaintiff, where his testimony is against himself, is a competent witness, though objected to by the usee, if he do not himself object to testify.

Where a note was payable "in the notes of the chartered banks of Mississippi at par," it is not competent to explain by parol the kind of funds in which the note was payable; as there was no latent ambiguity in the note; the note meaning that the notes of chartered banks were to be taken as at par, that is, without discount or premium.

To an action on a note payable "in the notes of the chartered banks of Mississippi at par;" a plea of tender in the notes of "chartered banks of Mississippi," without averring that they were "at par," is good.

In error, from the circuit court of Hinds county; Hon. John H. Rollins, judge.

Jordan Elder, who sued for the use of Edward Francis, sued Lewis Smith on the following note:

"On or before the 15th day of May, 1839, we promise to pay Jordan Elder, one thousand dollars in the notes of the banks of the state of Mississippi at par, at the office of Charles Hill, in Raymond, for value received.

Witness our hands the 1st day of October, 1838.

LEWIS SMITH,
CHARLES HILL."

Smith v. Elder.

On the note were these indorsements "Chartered banks are meant within, C. Hill." "11th December, 1838, received from C. Hill, two hundred and ninety-nine dollars, and sixty-six cents, to be applied as of 15th May, 1839." "I assign the within balance of seven hundred dollars for value received to Edward Francis, March 14th, 1839. G. W. Osburn."

The defendant pleaded 1. "*Nil debet*" to the sum credited by indorsement, and to the remainder pleaded that he was ready to pay at the maturity of the note, and so notified Francis; that the money has ever since been kept ready, and is now brought into court. Issues were taken on both parts of this plea.

2. The defendant plead further, a tender of the balance due in notes of the Mississippi and Alabama Railroad Company, the Bank of Lexington, and Commercial Bank of Rodney, averring that those were chartered banks of Mississippi; that Francis refused the tender; that defendant had always been ready, since the tender, to pay the same, and brings it into court. The plaintiff demurred, and there is in the record neither joinder in the demurrer nor a judgment upon it. The record then recites that the defendant plead as under the order "*respondeat ouster*."

3. A plea setting out that the action was founded on a note for \$1000 payable in the notes of the banks of the state of Mississippi at par, and indorsed at the time of making it, by one of the makers, with the assent of the payee, "Chartered banks are meant within," and with a credit indorsed for \$299⁰⁰/₁₀₀ on the 11th day of December, 1838. The plea then avers that defendant was ready to pay the balance due on the note at the time when and the place where it was payable, in notes of chartered banks of Mississippi; that he afterwards tendered payment in such notes, viz. notes of the Mississippi and Alabama Railroad Company, of the Bank of Lexington, and of the Commercial Bank of Rodney, which Francis refused; that defendant has always been ready to pay them, and brings the same money into court.

To this the plaintiff demurred, and defendant joined in de-

Smith v. Elder.

murrer, but no judgment was rendered upon it, so far as appears of record. The case was then submitted to a jury, and a verdict rendered for \$853 $\frac{23}{100}$, and judgment given for that amount.

A motion was made by defendant for a new trial, and overruled; whereupon a bill of exceptions was tendered and signed, and the evidence embodied therein. Two witnesses testified that Charles Hill, one of the makers of the note, remained at his office the whole of the day on which it was due, and the next, avowedly to receive and answer a demand for payment of the balance due on the note; that two days afterwards he made a tender in the notes above described, which was refused; that he kept the same notes ever after until the filing of the plea in this action, when he deposited them with the clerk of the court, who produced them at the trial.

The defendant also called in Elder, the payee in the note, to whom the plaintiff's counsel objected, but the court permitted him to testify if he did not object. He proved that it was the understanding at the time, that the notes of Mississippi banks should be at all times taken at par in payment of the note; that the addition 'chartered banks,' was added at his own request, to prevent a payment being made in the ~~minors~~ ^{minor} currency of the country; and that the tender proved was according to his understanding of the obligation of the note. His testimony was objected to also, as inadmissible in substance.

The defendant prosecutes this writ of error.

Dabney, for plaintiff in error, cited *Marlow v. Homer*, 6 How. 187; *Bailey v. Gaskins*, 1b. 519.

E. W. F. Sloan, on the same side.

1. As to the admissibility of the testimony of Elder, I think no doubt can exist. Suppose, for a moment, that before the contract was reduced to writing, Smith had agreed to pay Elder gold or silver, or their equivalent in bank paper, it is not reasonable to suppose the words "in the notes of the banks of the state of Mississippi at par," would have been used.

2. Again, the words "chartered banks are meant within,"

indorsed upon the instrument, limit the maker to the payment of the notes of such banks only as are chartered. This is clearly a restriction; and wholly inconsistent with the idea that such bank notes only as were worth their nominal value in gold and silver could be received in payment, upon the face of the contract.

Now the meaning of the word "par," is this, "without discount or premium." It is the meaning attached to the word by the legislature of this state, in providing that the debtors of banks should have the privilege of paying those banks in their own issues. See the Statute Laws of 1840, p. 21, 22, § 2.

3. It is obvious then, we contend, that Smith undertook merely to pay, and Elder to receive payment in notes of chartered banks, without discount or premium, in other words, at their nominal value. It is contended, however, that the term "par" admits of another and different construction, and recourse is had to its use and application in the commercial world to show this. If so, then it creates a latent ambiguity, and the evidence of Elder was admissible to determine the sense in which the parties used it. As in *Goddard v. Bulow*, 1 Nott & McCord, 45, where the words "British weight" having been introduced into a written contract, it was held, that as the word "weight" had two meanings, gross and nett, this was such a latent ambiguity as to warrant the introduction of parol testimony. Or in *Livingston v. Ten Broek*, 16 Johns. R. 14, where the privilege of "cutting timber to be used in building" had been granted by deed, parol evidence was held admissible to show that the parties intended to apply the word building as well to the erection of fences as houses. Also where the word freight was used in a written contract, it was held that parol evidence might be introduced to determine whether it was intended to apply to the goods on board the ship, or the earnings of the ship. On this point see *Peisch v. Dickson*, 1 Mason 11; *Ely v. Adams*, 19 Johns. R. 313; *Dupree v. McDonald*, 4 Des. 345; *McMeen v. Owen*, 1 Yates, 135; 2 Dallas, 173; *Doe ex dem Jersey v. Smith*, 2 Brod. & Bing. 553; Sug. on Vend. 181, Am. Ed. 1846.

Smith v. Elder.

A. R. Johnston, for defendant in error, cited *Marlow v. Hamer* 6 How. 189; *Blackmore v. Negro Phil*, 7 Yerg. 452; *Bailey v. Gaskins*, 6 How. 519.

Mr. Justice THACHER delivered the opinion of the court.

This was an action upon a promissory note of the following tenor, to wit: "On or before the 15th day of May, 1839, we promise to pay Jordan Elder, one thousand dollars, in the notes of the banks of the state of Mississippi at par, at the office of Charles Hill, in Raymond, for value received. Witness our hands the 1st day of October, 1838. Lewis Smith, Charles Hill." Upon the back of the note were the following indorsements, to wit: "Chartered banks are meant within. C. Hill;" a credit for the payment of \$299 ²⁵/₁₀₀ on the 13th May, 1839; and an assignment of the balance due upon the note, to the use in the action, Edward Francis. There was a plea of tender in the notes of the chartered banks of the state, to which plea a demurrer was filed, upon the ground that the plea did not set out that the notes tendered were "at par." The record shows that the defendant plead again under a judgment of *respondeat ouster*. This statement shows sufficiently that the demurrer was sustained. If a record show a fact without ambiguity, express and particular statements of it need not be required. The plea of the defendant below, filed by virtue of the judgment of *respondeat ouster*, was similar to the original plea to which a demurrer was in point of fact sustained, and to this plea a similar demurrer was filed, upon which no judgment seems to have been pronounced, but the parties went to trial upon the issues already made up. Under the circumstances, this court may presume that the parties waived this demurrer. 7 Yerg. 452. Upon the trial, the nominal plaintiff was permitted to testify, although objected to by the plaintiff's counsel. His testimony told against himself, and if he did not object to testify, he was a competent witness. *Duncan v. Watson Adm'r.* 2 S. & M. 136. His testimony however, went to prove what was intended by the makers of the note in regard to the kind of funds in which the note was payable, but as there seems to

Smith v. Elder.

be no latent ambiguity in the note in this respect, the evidence should have been ruled out. The note is payable "in the notes of the chartered banks of Mississippi at par." This can only mean that those notes were to be taken *as* at par, that is, without discount or premium. With this view of the meaning of the language of the note, the plea in the action to which the first demurrer was sustained was a good and sufficient plea, and it was unnecessary to allege more in the plea, than to set out a tender of chartered bank bills of this state.

Judgment reversed, the demurrer directed to be overruled, and further proceedings to be had.

Mr. Justice CLAYTON dissented, on the ground that the demurrer should have been sustained. The plea not being a good defence, unless it averred a tender of bank notes, which were at par.

WILLIAM P. BROOKS et al. vs. THOMAS WHITSON.

R. obtained judgment at law against W. ; E., alleging himself to be the owner of the judgment, obtained from W. two notes in satisfaction of it, agreeing with W. that if he were not the owner of the judgment he would return the notes thus given to W. ; whereupon the execution was returned satisfied ; P. B. alleging himself to be the owner of the judgment at law, entered a motion in the circuit court to have the satisfaction set aside, which was done by that court ; B. having become assignee of E. of the notes of W. received by B. as indemnity for a liability of his for E. sued W. at law on the notes, and obtained judgment ; W. being prevented by high water from being at court to defend the judgment, filed a bill in chancery to be relieved from the judgment of the notes : *Held*, that the notes having been given on a condition which had failed, were not obligatory ; that the reason for not defending at law was sufficient ; and that B. being assignee of the notes merely as an indemnity, took them subject to the equities between W. & E. ; and that the action of the circuit court, in setting aside the entry of satisfaction, could not be collaterally questioned.

On appeal, from the decree of the vice-chancery court, at Holly Springs ; Hon. Henry Dickinson, vice-chancellor.

Thomas Whitson stated in his bill that John Crouch, suing for the use of James M. Ross, had obtained judgment against him on a note made by him jointly with, and as surety for, Needham Stevens, for \$1550 ; that Stevens was insolvent, when execution issued on the judgment : Albert G. Ellis, representing the judgment to belong to him, requested payment of it ; that Rawlings & Butler also claimed the judgment, as he had been informed, of which fact he informed Ellis, who insisted that he was sole owner, and agreed to receive, and did receive, his notes, one for \$1000, and the other for \$500, due the one in February, 1840, the other in September, 1840, in satisfaction of the judgment ; with the agreement, that if any other claim superior to his was established, that the notes thus given should

be absolutely void, and be returned, upon which the execution on the judgment had been returned satisfied; that afterwards, at the May term, 1841, of the circuit court of Ponola county, Rawlins & Butler claimed the judgment at law, and had the entry of satisfaction set aside, though Ellis was in court at the time, and resisted it, but took no appeal, or writ of error; and the circuit court ordered an alias *fi. fa.* to issue for the use of Rawlings & Butler; and that the judgment thus in force against him was yet unsatisfied; that Ellis, in violation of his agreement, assigned the notes, given as above stated, fraudulently and colorably, to William P. Brooks, who had sued him upon them, and at the May term, 1841, of the Ponola circuit court, recovered a judgment against him on the \$500 note; that the writ in this suit was returnable to November term, 1840, but there was no court; that he was in attendance, and intended to employ counsel to defend the suit, but as there was no court the counsel did not attend; that he postponed therefore the employment of counsel until next term; that previous to the commencement of the term he was detained in Tennessee, whither he had gone on pressing business, by the illness and death, under distressing circumstances, of his wife, by which, and his age, feebleness, and troubles, he was unable to get back to Mississippi until after the commencement of the May term, 1841, of the court; yet still in time to make his defence; but the very night after his return a violent storm of rain swelled the water-courses to such extent that it was impossible for him to cross them, as they ran immediately between his residence and the court house; that he attempted their passage, but found it impracticable; nor were they passable until after court adjourned. That General Bradford, an attorney of the court, and an old friend of his, and whom he intended to have retained, was about to file a plea for him to the case, but that Ellis fraudulently represented to him that he had agreed not to make any defence to the suit; and that Brooks was pressing the execution against him; he prayed for a perpetual injunction and general relief.

Brooks answered, that Ellis had, in 1840, transferred the

judgment which he alleged he held against the complainant, and afterwards the notes to him as indemnity for liabilities of his for Ellis; that the complainant was the first to inform him of the transfer of the notes, and expressed his gratification at it, and promised to pay him the notes without suit; that the complainant, at the time he informed him of the transfer, told him that the notes were given in satisfaction of the judgment at law against him held by Ellis, and that in making the arrangement with Ellis he had consulted able counsel; was safe, and would pay the notes. That, relying on these representations, he made no attempt to get additional security or indemnity from Ellis, and insists therefore on being protected in his assignment; as, but for these assurances, he would have obtained other indemnity; that his liability for Ellis was yet unextinguished.

Ellis answered, that he had purchased of Ross, for full value, the judgment he had obtained against the complainant Stevens, and was the owner of it, and took an assignment from Ross, which he exhibited, with his answer; he admitted that the notes were given by the complainant, in satisfaction of the judgment; but denied that there was any condition attached to them; that the complainant stated at the time that he had advised with able counsel, who had instructed him how to proceed, and that he was perfectly satisfied that he was perfectly safe in the arrangement he was making; that the complainant, with his attorney, and the sheriff and respondent, were all present when the notes were given, and satisfaction entered on the execution, and the complainant often consulted his attorney, and expressed his satisfaction with the arrangement; that there was no agreement whatever that in case his title failed to the judgment the notes should be void, or be returned; they were given *without condition*, for the respondent's claim to the judgment, on full examination of the nature of that claim by complainant; who knew at the time that they were to be transferred to Brooks, and expressed his pleasure thereat; Brooks being then, and still, surety in large sums for respondent.

He denies having prevented General Bradford from filing a

plea; or that the complainant was prevented by high water from attending court; affirms that the complainant had combined with Rawlings & Butler to give their claim to the judgment against Stevens and complainant a preference over his; and that complainant had received full indemnity from Stevens.

He admits the motion in the circuit court to have the entry of satisfaction on the judgment, in favor of Couch, use of Ross, set aside; and that he resisted it, and that it was decided in favor of Butler & Rawlings, but he denies that the circuit court had any jurisdiction over the motion, at the suit of persons not parties to the record, and affecting his rights also when he was not a party to the record; he admits that he took no appeal.

He insists, as a plea in bar to the complainant's right of recovery, that he had filed a bill of interpleader in the superior court of chancery at Oxford, against respondent Brooks, and Butler & Rawlings, touching the matters in controversy in the present bill, which had been heard and determined against the complainant.

He denied all fraud, and made an exhibit to his answer of the proceedings on the motion in the circuit court, to have the entry of satisfaction set aside; which it is not deemed necessary to notice further than to state that it appeared that Ellis and Whitson, by counsel, resisted the motion; though no written notice was served upon them.

W. M. Smith, the sheriff of Ponola county, proved the agreement between Whitson and Ellis to be as stated in the bill of the complainant.

S. W. Evans proved the attempt of Whitson to get to court, and his failure on account of the high water; the creeks being swollen so that they could not be forwarded, and the bridges being washed away.

Joel Rainer proved similar facts as to the high water, but did not know of his attempt to get to court.

Calvin Miller proved that he was agent of Brooks and the sheriff and Ellis on the day after the execution of the notes and the entry of satisfaction. Called on him with the notes which were then given to him as agent for Brooks, with the

Brooks et al. v. Whitson.

understanding that if the return of satisfaction should be set aside, or Ellis's right to the judgment be determined against him, the notes should be re-delivered to Whitson, the sheriff being anxious lest he should be endangered by receiving the notes, if it should turn out that Ellis had no right to the judgment; that the witness retained these notes under this arrangement, until he was satisfied the sheriff was not likely to suffer loss on account of them, when he delivered them to Brooks.

S. B. Whitson and R. E. Beaty proved the attempt to reach court, and the failure on account of high water.

The respondents took various depositions to establish the right of Ellis to the judgment against Stevens and complainant; but it is not deemed requisite to notice them further; they also attempted to show that there was a way by which the complainant might, notwithstanding high water, have arrived at court, being some five or six miles further round.

The cause being submitted for final decree the vice-chancellor made the injunction prayed for by the bill perpetual; and the defendants appealed.

Hawkins, for appellants.

1. The circuit court had no right to adjudicate upon the rights of the parties who claimed the judgment. That it is the practice of circuit courts to protect assignees not of record, is admitted, but such practice is modern, and an assumption of jurisdiction, and as such should be construed so as to limit it strictly within decisions, and not to extend it. The practice originated in equity of protecting assignees, and courts of law followed chancery in protecting assignees upon suits in courts of law; but the decisions do not show that courts of law go further than to protect assignees, so that their rights may not be jeopardized. "When facts can be clearly ascertained assignees will be protected." 4 Black. Com. 442. Which author shows that in so doing courts of law adopted a new and liberal course, and aided equitable rights. "Courts of law will afford every protection to assignees of choses in action, not inconsistent with established principles and modes of proceeding." 1 Cond.

R. Supreme Court of the United States, 416, in note referred to 1 Wheat. 233.

"An indorsee of unnegotiable paper, under the common law, had to resort to a court of equity." 5 Rand. R. 43; 2 Black. Com. 442; 4 Cruise's Dig. 104. The act in Pennsylvania, making bonds assignable, was to prevent the assignee from releasing after assignment. 1 Dal. R. 28, last paragraph. In the case of *McCullum v. Coxe*, 1 Dal. R. 139, the court protected the assignee, but said that the docket should show for whose use the action was brought. 1 Mass. R. 488. "By the modern practice the assignee may sue in the name of the obligor, as his attorney, but there should be an express authority inserted in the assignment. 1 Bacon's Ab. tit. Assignment, A, note a.

The first instance of a court of law protecting an assignee is in Bosanquet & Puller's Reports. In this case the court did protect, but expressed a doubt whether it could do so summarily upon motion, or upon *audita querela*, or should not turn the parties over to chancery.

2. Brooks was not a party to the proceedings on motion, and could not be concluded by the judgment. If the rights of assignees are so precious, here was Brooks, an assignee for a valuable consideration, without any notice of adverse equities; lulled to security by the representations of complainant himself; without notice of the motion, who might have a good equity against complainant, as will be shown, even if Ellis had such. Can his rights be adjudicated upon by notice to Ellis only? 1 Johns. R. 550.

3. Butler & Rawlings should be made parties to the bill, as well as Ross and Ellis; without them a decree cannot be made.

4. Ellis is a purchaser for a full and valuable consideration, without notice of a prior equity. "When there are two *bona fide* equities the court will not interfere to give preference, or act against either; he who has the advantage at law would be left to enjoy it." 1 Johns. R. opinion of Kent. C. J. 566, 567. It is an established rule in equity to give no assistance against a purchaser for a valuable consideration, without notice. He

has equal claims upon the equity of the court. 2 Fonb. 3d Amer. ed. page 442, marginal, 147, note *; 1 Eq. Dig. 187, sec. 4, 5, and 52.

5. Brooks was an innocent purchaser, for a valuable consideration. "He has equal claims to the equity of the court." See authorities above quoted. "A subsequent assignee may have better equity than the prior assignee." 1 Eq. Dig. 195, sec. 77; 5 How. R. 471, 698; 1 Eq. Dig. 187, sec. 4, 5, and 52.

Mr. Justice THACHER delivered the opinion of the court.

This is a writ of error to the vice-chancery court of the northern district.

The bill of complainant, in the court below, sets out that John Couch, for the use of James M. Ross, recovered a judgment against him in the circuit court of Ponola county, in the sum of about \$1550, upon a promissory note, upon which he was surety for Needham Stevens; that Albert G. Ellis approached him, claiming to be entitled, by assignment, to the amount due upon the judgment, and proposing to him to settle and satisfy the said judgment, by giving two promissory notes, one for \$1000, payable in February, 1840, and the other for \$500, payable in September, 1840, and promising to surrender up the said notes and hold them void, if any claimant to the judgment, with a superior title to that of Ellis, should succeed in pressing his title. The bill further charges that the complainant, after some conversation with Ellis respecting a title which Rawlins and Butler were supposed to have to the judgment, agreed to the proposition upon the aforesaid terms, and made and delivered the notes; but that shortly after Rawlings & Butler entered their motion in the circuit court of Ponola county, and succeeded in setting aside an execution upon the judgment which had been returned by the sheriff, as satisfied by virtue of the agreement between the complainant and Ellis, as before described, and obtained an order for the issuance of an *alias fieri facias*, to issue in their own behalf. The bill further alleges that Ellis, conspiring with William P. Brooks, assigned the notes to him, and that Brooks instituted suit upon the note for \$500; that the com-

plainant attended the court at its first term after the institution of the suit, for the purpose of defending it, but the term failed to be holden, and that at the subsequent term, he was detained and prevented from attending by the death of his wife, in the first instance, and by high water, which rendered the roads impassable, and that an attorney, a friend of the complainant, who was desirous of entering a plea in the case, was prevented from so doing by the representations of Ellis that there was an agreement that no defence was to be made. The answers of Ellis and Brooks deny all fraud, and insist that the transaction was *bona fide*, and for a good consideration.

The evidence of William W. Smith, the sheriff of Ponola county, supports that portion of complainant's bill relating to the conditions upon which Whitson, the complainant, made and gave the notes to Ellis. He says, that, "before the notes were given up, Ellis agreed that if it should turn out that he had not a good right to the execution, that Ellis was not to collect the notes of Whitson." Calvin Miller, another witness, testified that it was agreed between Smith, the sheriff, and Ellis, that if it should turn out that Smith had no authority under the direction of said Ellis to receipt said execution by means of the notes, that they should be given up to Whitson. It was likewise found that the usual road from Whitson's house to the courthouse of Ponola county was obstructed by the high water at the period mentioned in the bill of complaint, and that Whitson attempted, and was prevented from making his way there.

It is clear that the delivery of the notes by Whitson to Ellis was a conditional contract, and that the condition upon which they were to be collected by Ellis failed. The propriety of the judgment of the circuit court in favor of Rawlings & Butler, cannot now be inquired into. It is enough, however, that that judgment defeats the condition of the contract. Brooks received the notes merely as indemnities against his liability for Ellis, and he consequently took them, liable to the equities subsisting between Ellis and Whitson.

The point made by Ellis, in his answer, that a decision of the case has already been had in chancery, and that it operates as

a bar to this action, is not accompanied by any record of such decree, and cannot be considered.

The decree of the vice-chancellor, ordering the injunction to be and remain perpetual, against the judgment and execution upon the note of \$500, be and the same is hereby affirmed.

Mr. Justice CLAYTON, having been counsel in the court below, in one branch of this cause, gave no opinion.

POLLY WADLINGTON, Executrix of Mercer Wadlington, deceased,
vs. ALLEN GARY.

Where a bill of exceptions refers to papers, without incorporating them in the bill, the high court of errors and appeals cannot notice the papers referred to.

Mere indulgence granted to the principal in a note, without the consent of the surety, does not release the surety; to release the surety there must be a valid agreement for indulgence, founded upon a sufficient consideration; such an agreement as can be enforced in a court of justice.

Indulgence granted to the principal in a note, without the consent of the surety, upon the promise of the principal to pay the note out of the proceeds of a particular judgment; or, if that failed, then out of a particular note, will not release the surety; the creditor having no means of enforcing either promise.

J. W. with G. as his surety, executed a note to the executrix of M. W.; J. W. died, and F. G. W., his administrator, who was one of the distributees of the estate of M. W., directed the executrix to retain the note out of his distributive share, which was not done; the executrix sued G., the surety of J. W. on the note, and G. plead payment: *Held*, that the debt being due from J. W. and the distributive share being due to his administrator, there was an absence of that mutuality, which is essential to the right of set-off; that the executrix could not compel compliance with the direction of F. G. W., and it did not therefore amount to a payment of the note.

ERROR, from the circuit court of Carroll county; Hon. Morgan L. Fitch, judge.

On the 18th day of February, 1841, Polly Wadlington, as the surviving and sole acting executrix of Mercer Wadlington, deceased, filed in the office of the clerk of the circuit court of Carroll county, a declaration in assumpsit against Thomas H. Gamer and Allen Gary, founded on a promissory note for eight hundred and twenty-eight dollars, drawn by James Wadlington, Thomas H. Gamer, and Allen Gary, in favor of the execu-

Wadlington v. Gary.

tors of Mercer Wadlington. The process was returned not found as to Thomas H. Gamer, and executed on Allen Gary. At the return term the defendant, upon whom the process was served, filed, under oath, a plea in abatement, which averred that Warner W. Wadlington and William Pack were appointed executors of the last will and testament of Mercer Wadlington, deceased, jointly with the plaintiff; that the will was duly proved in the probate court of Madison county, Mississippi, and that Warner W. Wadlington and William Pack were still living, and not joined in this action. The plaintiff demurred to this plea, and the court sustained the demurrer, and rendered a judgment of *respondent ouster*. The defendant then filed three pleas. 1st. That the note sued on was made by James Wadlington as principal, and defendant signed the same as surety, for the accommodation of James; that after the note became due James Wadlington died, and letters of administration on his estate were granted by the probate court of Madison county to Felix Wadlington; that Felix Wadlington had obtained a judgment in the circuit court of Madison county against — Jones, for a large sum of money, to wit, two thousand dollars, on which judgment an execution was issued, and levied on sufficient property to satisfy it; and that before the day of sale it was agreed by Felix Wadlington, and Warner W. Wadlington, then acting as executor of Mercer Wadlington, deceased, and who then held the note sued on, that if Felix would transfer and assign to Warner a sufficient amount of the judgment against Jones to satisfy the note, Warner would forbear to sue on the note; that Felix did make a transfer of a sufficient amount of the judgment to satisfy the note, and authorized Warner to draw the money from the sheriff; and in consideration of such agreement and transfer, Warner, without the knowledge or consent of the defendant, did forbear to bring suit on the note, until the day of the sale of Jones's property, and for some time thereafter. 2d. A plea of payment. 3d. That the defendant signed the note sued on as surety for James Wadlington, who was the principal; and after the death of James Wadlington his estate was released from the payment of the

note by the executors of Mercer Wadlington, for and in consideration of the assumption and promise of Felix Wadlington, who was then acting as administrator of James Wadlington, that he would pay the same out of his own goods and chattels. To these three pleas the plaintiff filed replications traversing the averments of the pleas, and upon them issues were joined. At the October term, 1842, the case was tried, and a verdict and judgment were rendered for the defendant; and upon the motion of the plaintiff a new trial was granted. At the April term, 1843, another trial was had, and a verdict and judgment were rendered in favor of the plaintiff; and upon the motion of the defendant a new trial was again granted by the court. To the granting of a new trial by the court the plaintiff filed a bill of exceptions, which, the court refusing to sign and seal, it was certified by two practising attorneys of the court. This bill of exceptions simply refers to the motion and affidavit upon which it was based, as follows: "Be it remembered that, upon the motion for a new trial," "(here insert it.)" "And upon the affidavit of Allen Gary," "(here insert it.)" Both the motion and affidavit are then spread out in the record. None of the evidence given upon the trial is set out in this bill of exceptions. At the October term, 1843, the case was tried a third time, when a verdict and judgment were again rendered in favor of the plaintiff. Upon motion of the defendant the court a second time granted him a new trial, to which the plaintiff tendered a second bill of exceptions, which also omits to set out any of the evidence offered or given upon the trial; and only refers to the motion for a new trial, and two affidavits and a certificate upon which the motion was based; the motion, one of the affidavits, (the other the clerk states in the record was lost,) and the certificate, were copied into the record, but it is not considered necessary that the substance of either should be stated here. During the progress of the second and third trials the defendant filed several bills of exception to opinions of the court, ruling out evidence offered by him, none of which need be noticed, as neither entered into the consideration of the court. At the April term, 1844, the cause was tried a fourth time, when the jury

Wadlington v. Gary.

found in favor of the defendant; and the court entered judgment thereon accordingly. The plaintiff moved for a new trial because the verdict was against the law and evidence; and because the jury disregarded the instructions of the court. Upon his motion being overruled by the court he filed a bill of exceptions, which substantially discloses the following facts, to wit: That upon the trial the plaintiff read to the jury the note sued on, and rested the case. The defendant then introduced Warner W. Wadlington, who testified that the note sued on was given for a negro sold by the executors of Mercer Wadlington to James Wadlington, and the defendant was only the surety of James Wadlington; that the witness acted as one of the executors of Mercer Wadlington, until some time during the year 1840; and while he was so acting, the note being in his hands, and past due, he presented it to Felix G. Wadlington, who was the administrator of James Wadlington, the principal in the note, and demanded payment, and threatened to sue him if the note was not paid; when Felix G. Wadlington agreed that if he would forbear to bring suit, he might retain out of the proceeds of an execution, then in the hands of witness, as deputy sheriff of Madison county, which had been issued on a judgment recovered by Felix G. Wadlington against — Jones, and was part of the assets of the estate of James Wadlington, and which had been levied on property of Jones, that was soon to be sold, a sufficient amount to discharge the note; that relying upon that agreement, and in consideration thereof, he did not sue on the note; that on the day appointed for the sale of Jones's property Felix G. Wadlington ordered the sale to be postponed; that after the sale was postponed, by the directions of Felix G. Wadlington, he again demanded payment of the note, and threatened to sue if it was not paid. And Felix again promised if suit was not instituted the execution against Jones should not be suspended any longer, and the note should certainly be paid out of the proceeds of that execution; but if anything should happen to prevent the payment of the note out of the proceeds of the execution, Felix promised to transfer to him a note on William Barrow, who was perfectly solvent, in payment of the

Wadlington v. Gary.

note sued on. And he again agreed with Felix, in consideration of these promises, to forbear to bring suit; all of which, he said, was without the knowledge or consent of the defendant. The witness further testified, that after Felix G. Wadlington failed the second time to pay the note out of the proceeds of the judgment against Jones, and had also failed to transfer the note on Barrow, according to his promise and agreement, Felix G. Wadlington, who was one of the distributees of the estate of Mercer Wadlington, agreed with him, that he should retain the amount of the note sued on out of his, Felix's distributive share of that estate; after which time he always considered the note as settled in that way. On being cross-examined the witness stated that when he settled with the probate court, and surrendered his letters testamentary, he returned the note sued on as part of the assets of the estate of Mercer Wadlington; that the defendant was his neighbor and son-in-law and had never requested him to sue on the note, nor said anything to him about it. The defendant also introduced another witness, who proved that Felix G. Wadlington had some time before the trial given him an order on the plaintiff for one hundred dollars, to be paid out of the estate of Mercer Wadlington, deceased; but the order had not been paid. The will of Mercer Wadlington, and various transcripts of records from the probate court of Madison county, are referred to in the bill of exceptions, and by the clerk copied in the record; but none of them, under the opinion of the court, need be noticed.

The plaintiff brought the case to this court by writ of error.

A. C. Baine, for plaintiff in error.

The first obstacle to the reversal of this judgment will doubtless be a technical one, that the matter of the bill of exceptions cannot be inquired into—a great deal of it—because it was not incorporated at the time, but *ordered* to be done by the judge by a reference to the paper to be inserted. It strikes me the objection, in this case, is without even a technical force. For you have the same authority for believing these papers to be a part of the record, that you have to believe the judge signed a

bill of exceptions at all. The ground for the belief of either is the certificate of the clerk. You rely upon that to show that there is *any* record.

But granting I am wrong in this, I think this case will then fall within the exception in *Goode v. Lesicnum*, 1 How. 283. "A case where the reference is made with such apt descriptions of documents intended to be incorporated in the bill of exceptions, as to leave no possibility of doubt," &c. is an exception. This, I take it, applied to a case where the paper was not even in the bill. See same doctrine in nearly the same words in *Berry v. Hale*, 1 How. 319.

I may here remark that there is not throughout the record a particle of legal proof in support of the third plea, that Felix Wadlington became liable, or promised to pay the note sued on out of his share of Mercer's estate. For the witness who states this fact, also expressly states, that no written promise or obligation was given. It is then certainly void by the statute of frauds, even if sufficiently proved. For an administrator cannot become liable for his intestate's debt without an express undertaking in writing.

About the last verdict (which resulted for the defendant) I have little to say. The full proof that the defendant wanted to make, but by his negligence was unprepared to make, on the verdicts which were had for the plaintiff, was made on the last trial. I do not think, upon examination, Warner Wadlington's testimony (for the record evidence only became material to show his authority,) shows a binding and valid agreement, for a specific time, founded on good consideration, under the rule in *Newell & Pierce v. Hamer*, 4 How. 684.

The parties themselves (Warner and Felix Wadlington, in the several representative capacities) evidently did not regard them as such. For they repeatedly acted as if there were no such agreement.

But if the court should come to a different conclusion, still it is immaterial, for the judgment in our opinion must be reversed, for the error of the judge in granting new trials upon either of the verdicts that were had for the plaintiff.

Sheppard, for defendant in error.

This court cannot revise the orders of the circuit court, granting new trials at the April and October terms, 1843.

The bills of exceptions taken by the plaintiffs do not conform to the provisions of the statutes allowing an appeal from such orders. They do not contain the substance of the evidence, nor the matters in which the judgment of the court was pronounced. The presiding judge very properly refused to sign the first bill of exceptions for this cause. The second bill of exceptions does not contain the affidavit of Gary. And the two documents which it attempts to bring before this court were not embodied in it in any other manner than by a reference of "(here insert.)" These documents are not connected with the cause. And it has been decided by this court, that such a reference is insufficient. *Berry v. Hale*, 1 How. Rep. 315. If all the evidence in the cause is not fully set forth in the bill of exceptions, the judgment or order will be affirmed. *Carmichael et al v. Browder's Ex'rs. et al.* 4 How. Rep. 431.

The last bill of exceptions taken to the order refusing to grant a new trial, at the April term, 1844, presents the whole merits of the case.

The proof fully sustained the issues on the part of the defendant. It shows 1. Such an agreement to forbear suit as would discharge a surety. 2. Such laches on the part of the creditor in failing to collect collateral securities which were sufficient to discharge the debt, as will also warrant the release of the security. 3. That the debt was settled.

The rule is now well settled, that any pending agreement to forbear suit but for a day, will discharge the security, if done without his consent. The proof shows that James Wadlington, the principal obligor, and that Felix Wadlington, had recovered, as his administrator, a judgment against Jones, which was about to be executed by levy and sale of property under a *fi. fa.* The agreement stipulated that the executors should forbear suit until after the day of sale of the property so levied on; and in consideration of such forbearance the executor, who was also deputy-sheriff, was authorized to *stop, retain, and*

draw from the hands of the sheriff, so much of the proceeds of said judgment as would satisfy the debt.

This was in fact an equitable assignment of the judgment. Any agreement which shows an intention to appropriate the whole or part of a debt to a particular purpose, will be enforced in equity as an assignment. The executor had a right to detain and draw the proceeds from the sheriff's hands.

An order given by A. to B. to draw from C. a given sum, will be upheld in equity, as an assignment of so much of the funds of A. in possession of C., though C. should not accept or assent to it. 2 Story's Equity, 310, 311; *Heath v. Hall*, 4 Taunt. Rep. 326.

2. By such assignment the proceeds of the judgment became a trust fund for the payment of the debt. And though taken by the creditor it enured to the benefit of the security. The laches of the creditor in failing to secure this fund and suffering it to be lost, discharges the security.

No doubt can exist but that under the agreement the executors could have enjoined Felix Wadlington from collecting said judgment, or in any manner interposing to prevent them from collecting therefrom a sufficient amount to pay the debt.

3. It is shown by the bill of exceptions that Felix Wadlington directed the executor to retain the amount of the debt from his share of the assets of Mercer Wadlington, in possession of the executor, and he thus considered the debt settled.

Mr. Justice CLAYTON delivered the opinion of the court.

James Wadlington purchased property at the sale of Mercer Wadlington, deceased, and gave his note with Gary, as his surety. The principal in the note afterwards died, and Felix G. Wadlington became his administrator. Suit was brought upon the note in the Carroll circuit court. There have been four verdicts rendered in the cause; the first in favor of the defendant; the two next for the plaintiff; and the last in favor of the defendant. The plaintiff filed bills of exceptions to the orders, granting new trials on the verdicts obtained by her, but they are too imperfect to authorize a reversal of the

decisions. Instead of stating the facts, they refer to papers not incorporated in the bills. According to repeated determinations these cannot be here noticed. *Barfield v. Impson*, 1 S. & M. 330; *Carmichael v. Browder*, 4 How. 431. On the last verdict the motion for a new trial was overruled, and a bill of exceptions taken to this order. This bill of exceptions is also defective in form, since it refers to certain papers, and does not set them out. Yet their substance is set out, in a way which complies with the requisitions of the statute on the subject. In the other exceptions, the substance is not given, except by way of reference.

The defence set up in the case, is first, time granted to the principal without the consent of the surety, and next, payment of the note by the administrator of James Wadlington. There is no doubt, but that time was granted to the principal. But mere indulgence does not release a surety. There must be a valid agreement for indulgence, founded upon a sufficient consideration — such an agreement as can be enforced in a court of justice. The rule is very clearly laid down by the court, in *Newell v. Hamer*, 4 How. 690. The agreement set forth in the testimony is not of that character. It was made with Warner Wadlington, then an executor of Mercer Wadlington, but who is no longer such. If suit had been brought upon the note, a recovery upon it could not have been defeated, by reason of this alleged agreement. Nothing passed to the executor. He agreed to grant indulgence, because of a promise that he should receive payment out of the proceeds of a particular execution, or if that failed, then out of a particular note. The executor had no means of enforcing either of these promises, and the money was not made upon the execution because of the interference of Felix G. Wadlington. This shows the executor had not the control of it, nor the power to enforce the promise. It was like the promise "to deliver cotton," in *Newell v. Hamer*.

Next as to the payment. The note was that of James Wadlington. Felix G. Wadlington, his administrator, was one of the distributees of Mercer Wadlington, deceased, and he di-

rected the executor of Mercer Wadlington to retain the note out of his distributive share. This was not done. The present executrix, the plaintiff in this suit, cannot compel compliance with this direction. She cannot compel it as a set-off. The debt is due *from* James Wadlington—the distributive share is due *to* his administrator. There is an absence of that mutuality which is essential to the right of set-off.

In our view neither ground of defence is sustained, and the judgment must be reversed, and new trial awarded.

Judgment reversed, and new trial awarded.

WILLIAM HUNT vs. PETER C. CHAMBLISS.

Where one surety on a note pays it, and files a bill against a co-surety for contribution, the defendant may prove by parol evidence the engagement actually undertaken by him when he signed the note.

In a controversy between two sureties on a note for contribution, the principal being equally liable to both, stands indifferently between them, and is a competent witness.

B. made a note with H. and others as sureties thereon, to a bank; when it became due, B. wished to renew it, but the bank would not permit the renewal to be made without the payment of a portion of the amount due, and additional security given. B. to obtain the renewal, paid the sum required by the bank, and requested C. to go on the note to be given in renewal, having previously obtained the names of the parties who were bound on the first note, and C. did so; judgment was obtained on the last note, and H. paid the money, and filed a bill against C. for contribution: *Held*, that C. was not a co-surety with H. and others for B., but a surety for B. and his original sureties, and therefore not liable for contribution to H.

On appeal, from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

On the 2d day of May, 1843, William Hunt filed a bill in the superior court of chancery, against Peter C. Chambliss, alleging that himself, Noah Barlow, Samuel Chamberlain, Isaac W. Arthur, and Zenas H. Fulton, partners in trade under the name of Arthur & Fulton, and Peter C. Chambliss, on or about the 15th day of February, 1837, made and executed their joint and several promissory note in favor of the president, directors and company of the Planters Bank of the state of Mississippi, for the sum of \$15000, payable thirteen months after date, the consideration of which was a loan of that amount by the bank to Barlow, and that complainant and the other parties to the note were the accommodation securities of Barlow; that on or about the 23d June, 1840, the payees of the note obtained a

judgment against all the above-named makers, in the circuit court of Adams county, for the sum of \$17,713 $\frac{23}{100}$, bearing 8 per cent interest, and costs amounting to about \$30; that executions of *feri facias* had been issued to the counties of Adams, Jefferson and Washington in this state, where all of the defendants reside, and the sheriffs of said counties had returned that the defendants had no property out of which the debt and costs could be made; that in truth and in fact all of the defendants except the complainant and the defendant in this bill were entirely insolvent.

That complainant at different times since the rendition of the judgment, had been compelled to pay the largest part of it with all interest and costs, amounting to the sum of \$19,968 $\frac{17}{100}$, and he exhibited copies of the note, record of this judgment, executions and receipts of payments, and that the judgment was paid in full; that in equity, Chambliss who was solvent, ought to reimburse to complainant the one half of the amount so paid by him, with interest thereon as on so much money loaned; that he had frequently applied to the defendant to make such contribution and he absolutely refused to do it. The prayer was that Peter C. Chambliss be made defendant and compelled, by a proper decree, to pay him the full half of the sum paid by him with interest, and for general relief.

The defendant, uniting a demurrer with his answer, admitted that the parties complainant and those mentioned in the bill, did about the time stated, make and execute their note in favor of the bank for the sum of \$15,000 payable thirteen months thereafter, and he supposed, but did not know the fact, that the note bound the parties jointly and severally, for he had no recollection of the form of the note. Defendant denied that the note was based upon a loan of that amount by the bank to Barlow, or that the other parties to the note were the accommodation sureties of Barlow; on the contrary he averred and charged that Barlow, William Hunt the complainant, Samuel Chamberlain, Isaac W. Arthur, and Zenas H. Fulton, together with Daniel G. Barlow, John G. Taylor, and Silas Sillard were indebted to the bank in the sum of \$20,000 or thereabouts, and

being so indebted and unable to pay the whole amount thereof at that time, it was agreed by the debtors and the bank, that the parties to the note should pay to the bank the sum of \$5000, and that a new note should be given by the debtors, with this defendant as their security, for the sum of \$15,000, payable thirteen months after date, and the defendant having confidence in the ability of Barlow, Hunt and others to pay the demand, consented thereto, and did sign the note as their security for the purpose aforesaid, and the note thus given was used by Barlow, Hunt and others in taking up their previous liability to the bank. Defendant believed that Barlow was the principal in the original debt of \$20,000, and that Hunt, Chamberlain, Arthur & Fulton, D. S. Barlow, John G. Taylor, and Silas Silard were in that transaction accommodation securities; he admitted the note had no other consideration than as herein stated, and so far as he was concerned it was without any consideration good or valuable in law, and inasmuch as it was not given for the loan of money, it was absolutely void in law, because the bank had no power under its charter to receive it; defendant did not admit that the complainant occupied the position of a security only in the note of \$15,000. He admitted the recovery of the judgment against Barlow and other the defendants at the time, and for the sum stated; that executions had been issued, and some of them returned *nulla bona* or to that effect, but of the correctness of such returns he did not admit; he charged that they were untrue, and were either ordered to be so made by the plaintiff therein, or were caused to be made by complainant or his attorneys at law; that he did not know or admit the insolvency of the other defendants, on the contrary, he averred that they were respectively in the possession and control of large estates, either by themselves or under cover of the names of other persons, and that any just debt of four or five thousand dollars could be made out of them respectively, if the proper means were employed; he stated that he had no personal knowledge of the payments made by complainant on the judgment, but he had been informed that he had made some payments in the depreciated paper (worth less than

fifty cents on the dollar) of the bank, nor did he know or admit that complainant had paid the whole amount of the judgment, and required full proof of that fact. It was true he believed the judgment had been satisfied, but not fully by the complainant; he denied that any demand by complainant was made upon him for contribution, but if such a demand had been made he admitted that he would have refused to comply with it, because no valid claim existed against him, and because if complainant did pay the judgment it was done by an agreement made by and between the Planters Bank, Barlow and himself, without ever consulting with respondent, and because he was in law and equity bound to pay the judgment before respondent could be called on for any portion thereof, and because he obtained mortgage securities from or through Barlow for the payment of the note which ultimately secured the same, and being paid by the complainant to the bank, he was in a court of equity, or would be upon his motion, subrogated to the rights of the bank under the mortgage. Respondent showed that pending the suit at law, and before the recovery of the judgment therein, complainant instigated and procured the bank to take additional security for the payment of the note of \$15,000, which was intended for the protection of complainant, and which was obtained and secured in the following manner, as respondent had since been informed and believed to be true, to wit: Barlow, acting under the urgent solicitations of the complainant, procured one Deman B. Spencer, who was either largely indebted to Barlow, or who was the holder of the legal title of the property mentioned for the use of Barlow, on the 7th day of July 1839, to mortgage to the bank the one undivided moiety of a lot in the city of Natchez, on which the City Hotel is erected, also an undivided half of all the household and kitchen furniture, apparatus and utensils &c. belonging to the hotel, for the express purpose of securing the payment of certain notes specified therein, the first of which is the \$15,000 note mentioned in the bill; and he made the mortgage an exhibit to the answers. Respondent stated that divers executions were issued upon the judgment, and at that time the money could

have been made out of the estate of Barlow, but by the interference of complainant time and indulgence were given, until Barlow became insolvent. Respondent further stated, that after the mortgage was executed, the property therein mentioned was surrendered to the bank about the month of April, 1841, for the purpose of securing the judgment and other debts therein mentioned; that the property was of large value, estimated at some sixty or eighty thousand dollars in good money, and had been rented at about six thousand dollars per annum since that time, as respondent was informed and believed; that negotiations touching the execution of the mortgage and putting the bank in possession of the property were principally made by complainant, and altogether by he and Barlow, which together with the time given by the bank on the judgment in consideration of the mortgage, all of which was done without the knowledge or consent of the respondent in equity, operated a full and entire release of respondent, and if complainant paid the judgment it was by his own management, and in pursuance of his own arrangements, without the consent of respondent, and therefore he is not responsible to complainant for one cent, either in law or equity.

The deposition of Noah Barlow being taken by the defendant, after objections to his competency as a witness, he being a party to the note, had been made by the complainant, and overruled by the commissioner, proved the consideration of the note, on which the judgment was recovered, was another note of \$20,000, due the Planters Bank; that he paid the bank \$5000, and the discount on the note for \$15,000, and gave that in renewal of the balance due on the \$2000 note; that at the time he called on Chambliss for his name on the new note, he informed him the other parties were already liable to the bank, and were solvent; and that the object of getting his name was to get time from the bank, which had been promised on getting an additional name; that the new note was accepted by the bank, and the old one given up.

That on the 7th of July, 1839, he procured of Spence a mortgage of one half of the City Hotel, in Natchez, in favor of the

bank, to secure several notes, of which the note of \$15,000 was one. In consideration of which, the bank agreed to extend the time of payment of the \$15,000 note, and other liabilities of his to the bank, and did so extend the time; that he informed Hunt of the extension given by the bank, and he approved it; that he did not remember whether Chambliss knew it, as he had no recollection of seeing Chambliss about that time.

That after the date of the judgment, Spencer went to the bank and proposed, if they would give further time on the judgment, he would, on the 1st of April, 1841, give possession of all the property conveyed in the mortgage, to which the bank agreed. And on 1st of April, the bank did take possession of the hotel, and have held it ever since; he supposed the rent of one half of the mortgaged property was worth \$3000 per annum, and the rent was to be credited on the debts due to the bank mentioned in the mortgage. That since the judgment witness had paid \$500 or \$600 upon it. The first payment made by Hunt of \$4200 or \$4300, was in the paper of the bank, which was depreciated, but he did not know how much; that Chambliss was not bound by any other judgment in favor of the bank as his surety. On cross-examination, he stated that the agreement for extension of time between Spencer and the bank, was in writing. Complainant's counsel then objected to his testimony as to that agreement; and the commissioner sustained the objection.

He further stated that he applied to Chambliss to go on the note, without the knowledge of Hunt. He did so to obtain further time, which the bank refused, unless he would give additional surety. That the \$20,000 note was his own debt, and that the other parties on it were sureties. That when he applied to Chambliss to go on the new note, he informed him that the bank required the addition of a good name, as she considered the former security impaired; but that he considered the other parties good, and did not think there would be any risk in signing the new note; he also stated that he was confident he could meet it himself; that the transaction was for wit-

ness's accommodation, and at that time, and for some time subsequent, witness had ample means to pay the note.

He stated that the bank never gave him a stay of execution, nor did she delay enforcing the claim against him, but he understood from Hunt the bank agreed to wait with him, on getting one-third of the debt. That no money could then be made under execution out of any of the parties to the note, except Hunt and Chambliss.

Being reexamined by defendant, he stated that all the other names were on the note when he presented it to Chambliss for his signature; that Chamberlain and Arthur & Fulton continued solvent long after witness suspended payment, which was in the spring of 1840, and was occasioned by the magnitude of his debts contracted before the note was given. One half the City Hotel, in February, 1839, was, in his opinion, worth seventy-five or eighty thousand dollars; and the bank continues to receive the rent thereof.

The deposition of H. D. Mandeville, proved that the note for \$20,000 was discounted for Barlow, and the proceeds placed to his credit in the Planters Bank; that it was satisfied partly in money, partly from the proceeds of exchange, and partly from the proceeds of the note for \$15,000, discounted by the bank; that he did not know anything of any other security for the note, but from conversations with others, he believed the bank had a lien on the City Hotel; that he did not know who paid the \$15,000 note, nor what kind of funds it was paid in; that he knew of no proposition from Hunt relative to the \$20,000 note, nor any written communication concerning the \$15,000 note, though he believed Hunt did apply for a stay of the execution sent to Washington county, but witness could not find anything on the books of the bank authorizing a stay, and he did not know that any stay was granted; that he did not know that the note of \$15,000 was sued on, but presumed it was, as it was handed to attorneys for that purpose; that he knew of no other note for that sum, made by the same parties, and he believed the proceeds went to pay the note of \$20,000. He did not know that the bank had assigned to Hunt any security on

account of the note of \$20,000 or \$15,000, or subrogated him to the rights of the bank in any mortgage. The bank had made advances for the City Hotel, and received the rent, but had not received as much as she had advanced.

William Robertson proved that the \$20,000 note was taken up in part by the \$15,000; and that the payments which were made by Hunt, were made in the issues of the bank, which were not passing at their nominal value in gold and silver, when the payments were made; but he did not know the discount on them; that the bank advanced in cash to the City Hotel \$5818 67, for repairs, &c. and had received in rents \$4726 66; that the hotel rented for \$4000 per annum, half of which was received by the bank, and that none of the income from the City Hotel had been credited on the note for \$15,000.

G. W. Koonts proved the value in gold and silver, of the Planters Bank issues, at the time of the several payments made by Hunt, to be from forty-five to eighty cents on the dollar.

The complainant proved, by S. B. Newman, that no money could be made out of N. Barlow, Arthur & Fulton, and Samuel Chamberlain, under execution, since November, 1840; that he had known them for many years, and he was satisfied money could not have been made under execution against them, within eighteen months previous to 2d of January, 1844.

Arthur & Fulton proved that they paid for the use of Hunt, on the 17th of December, 1840, \$2350, for a check or draft of the Planters Bank for \$2500.

Alexander Montgomery proved that he had the control of the judgment in favor of the bank, and but two stays were given, and they to Hunt only; no stay was given to Barlow; that all the payments on the judgment were made by Hunt, and that all the other parties to the note were insolvent.

The original note was filed, and on its face was signed by Barlow as principal, and the other parties as sureties. On the foregoing pleadings and evidence, the cause was submitted to the chancellor, and he, on the 12th day of June, 1845, rendered a final decree, dismissing the bill; whereupon the complainant prayed an appeal to this court.

Montgomery and Boyd, for complainant.

The defence relied on is, that Hunt and Chambliss were not co-sureties of Barlow, but that all the parties to the note were principals as to Chambliss. This is based on the idea that the note of \$15,000 sued on was a renewal in part of another note of \$20,000, to which Chambliss was no party. The note, *on its face* (\$15,000,) and the proof shows clearly that Barlow was the principal and the only principal, and the rest were his sureties. We object to the proof to contradict the face of the note. Also to Barlow's competency to make such proof, if it can be made at all.

Sanders and Price, for defendant.

The ground of defence is, that defendant was not a security *in the same degree* with the complainant, for Barlow, in the debt paid by him, and for which he now seeks contribution, but was the security for both the complainant and Barlow, as it appears beyond all question; that the note given and paid by complainant was made to take up another note, in which complainant was bound and in which defendant was no party; and besides, when he signed the note, he was told by Barlow "that there was no danger, it was to renew a note in which Hunt and others were already bound," &c.; under which circumstances he signed it, regarding himself not as security for Barlow merely, but as security for all the names above his, who were on the prior note. We contend, that the authorities as well as the familiar principles of equity, deny contribution in such a case. The doctrine of contribution is laid down by Theobald, in his work upon Surety and Agency, p. 197, § 287, as follows: "The right to contribution exists between all sureties of the *same degree*," &c. P. 195, § 282. "This claim (of contribution) was first established in equity; and rests, as it seems, purely in that principle of morality which disapproves the infliction on one person alone of a demand to which others, in common with him, have made themselves *equally* liable; or that one person should exclusively bear the burden of a payment from which others, in common with him, derive equal benefit.

When, therefore, through the partiality of a creditor, an infraction of this principle takes place, a court of equity will interpose to remedy it, and will place the sureties relatively to one another in that state of equality with respect to the loss, which correspond with the equality of their risk and responsibility under their contract." P. 200, § 286. "If, upon becoming surety for a debt for which others also are sureties, the intention of any particular surety is to be liable only upon default of both the principal and the other sureties, those others are not entitled to contribution from him, he being regarded as the surety not only for their principal, but for them also." The author then refers to the case of *Craythorne v. Samburne*, 14 Ves. 160, overruling *Cooke v. —*, 2 Freem. 97.

George S. Yerger, on the same side.

The question, is whether Chambliss was a co-surety on the note, with complainant and others for Barlow, or whether he was not, in fact, a surety for complainant and others on the note. If the latter is the fact, Hunt, of course, is not entitled to contribution.

Could Chambliss become surety for all who preceded him on the note, although some of them were sureties? and if this fact be so, can it be proved by parol evidence?

Suppose he had *written* opposite to his name, security for all the above parties; could he be made responsible beyond his undertaking? Was not this a contract that he would be liable only as surety for all? So it has been expressly decided in *Harris v. Warwell*, 13 Wendell, 400. If then he could limit his contract by writing opposite to his name, he was surety for all; if he does not write this opposite to his name, may he not prove his contract by parol testimony? May he not prove that when he signed, although he knew that some of the names were mere sureties, yet that he undertook as surety for them? If he is allowed to prove this, the evidence makes out such a case. The case of *Craythorne v. Samburne*, 14 Vesey, 160, directly decides, that such evidence is admissible, and that case is almost verbatim like this. The facts were nearly the same.

Mr. Justice THACHER delivered the opinion of the court.

The decree of the chancellor dismissed the complainant's bill, from which an appeal was taken to this court. The first point in order presented by the record amply sustains the judgment of the chancellor, and therefore precludes the necessity of an investigation and opinion upon the other points which might equally warrant a similar conclusion.

It appears that Barlow and the appellant and others were liable upon a promissory note, payable to the Planters Bank of the state of Mississippi, in the sum of \$20,000. The note was discounted by the bank for the benefit of Barlow, who was the principal, and Hunt and the others were his sureties. Upon the maturity of this note, Barlow sought its renewal from the bank, which agreed to his desire upon the payment of \$5000 upon account of the note, and the addition of another name upon the note to be given for the balance, the bank conceiving the original security to have become impaired. Barlow applied to the appellee for the use of his name for this purpose upon the note to be given in renewal, informing him that the parties upon the original note were already bound to the bank, were amply solvent, and that the object of getting his name was to obtain time from the bank. At the period of Barlow's application to the appellee for the use of his name, the note in renewal had been signed by all the parties to it. Judgments at law were obtained against all the parties to this new note which was mainly paid by appellant, who files this bill for contribution from the appellee, who, alone of the parties, was deemed solvent.

The engagement actually undertaken by the appellee was susceptible of proof by parol evidence. It is evidence in support of the contract. No valid objection could be sustained to the competency of Barlow as a witness; he stood indifferent as to all the parties, being equally liable to them all.

The real question is, was the appellee co-surety with Hunt, the appellant, and the others, for Barlow, or was he, in point of fact, surety for Barlow and his original sureties, or so many of them as united in the note of renewal. Barlow and the others

in the original note were interested in obtaining the renewal sought from the bank, and the appellee suffered his credit to be used to secure their object, but without any individual interest up to that time. The consideration of the original note was the discount of \$20,000 for Barlow's benefit, but an additional and new consideration of the note in renewal was the time given by the bank to Barlow and his original sureties. Without the name of the appellee, or some other equally sufficient surety, the new note would have had no existence. As between the original parties and the bank, all were equally bound, and so between the parties to the note in renewal and the bank; but the same difference of obligation holds between the parties to the new note and the appellee, as existed between the original sureties and Barlow. This position rests upon a principle of equity, even if it were not still more substantially supported by the evidence respecting the actual and special contract of the appellee, which clearly was to become liable in the event the others did not pay, but not to become jointly liable with them. *Craythorne v. Samburne*, 14 Vesey, 160.

Decree affirmed.

EDWARD D. EDWARDS vs. COLEMAN M. ROBERTS.

It is well established, that, if a party has a knowledge that he has been defrauded, and yet subsequently confirms the original contract by making new agreements and engagements respecting it, he thereby waives the fraud, and abandons his claim to equitable relief.

E. purchased of R. certain lands, and took a bond for title; and becoming apprehensive that R. would not be able to make a good title to all of the land embraced in the purchase, he instituted suit on the bond; pending the suit it was agreed by the parties to submit to arbitration the amount to be allowed E. in the premises; the arbitrators not being able to agree, E. and R. determined to divide the difference that subsisted between arbitrators, and an award was made accordingly; which was recorded as a part of the proceedings in the action on the title bond, and entered as the judgment of the court; and E. gave to R. a new note in accordance with the terms of the award: *Held*, that whatever might have been E.'s equitable right to relief on account of fraud practised upon him in the sale of the land, by consenting to abide the result of an arbitration upon the matters in dispute, and giving a new note in accordance with the terms of the award, he virtually reaffirmed the contract, and relinquished any right to relief he might have previously possessed.

APPEAL from the vice-chancery court at Carrollton; Hon. Henry Dickinson, vice-chancellor.

On the 20th day of September, 1842, Edward D. Edwards filed a bill in the vice-chancery court at Carrollton, stating that on the 15th day of July, 1836, Coleman M. Roberts, designing to deceive and defraud him, proposed to sell him a tract of land containing about five hundred and twenty acres, described as follows, to wit: The south-east quarter and the east half of the south-west quarter of section No. 7, and the north-east quarter and the east half of the north-west quarter, and the north-east quarter of the south-west quarter of section No. 18, all in township twenty, north, of range nine east; that Roberts then represented that the west half of the north-east quarter of section eighteen belonged to Matthews T. White, but he could easily

purchase it from White; that Roberts, after inducing him to believe that all of the land, except the small portion owned by White, belonged to him, went with complainant, and showed him a small portion of the land which was very fertile and valuable, and then represented that the whole tract was equally rich and valuable, the portion shown being but a fair sample of the whole tract; that about two hundred acres of the land, as was well known to Roberts at that time, were of a very inferior quality, and not worth one dollar and twenty-five cents per acre; that being so deceived and defrauded by Roberts, he then verbally contracted and agreed to give ten dollars per acre for the whole tract; that on the 6th day of October, 1836, he perfected the purchase at five thousand two hundred dollars, being ten dollars per acre, and paid one third of the purchase-money in cash, and gave two notes each for one-half of the residue, the one payable on the 1st day of January, 1838, and the other on the 1st day of January, 1839, and in consideration thereof Roberts executed a bond for title to the land, to be made perfect in fee simple on the 1st day of January, 1837, which bond was made exhibit A to the bill; that on the 15th day of July, and on the 6th day of October, 1836, the land was not worth more, and had he not been deceived and misled by the misrepresentations of Roberts he would not have agreed to give more than two dollars per acre. The bill charged that on the 15th day of July and the 6th day of October, 1836, the south-east quarter of the south-west quarter, and the south-west quarter of the south-east quarter of section 7, in township 20, was the property of William Lindsay; that the east half of the south-east quarter of section 7, and the north-east quarter of the south-west quarter, and the north-west quarter of the south-east quarter of section 7, were vacant and belonged to the government of the United States on the 15th day of July, 1836, and continued to be the property of the United States until the 15th day of August, 1836, when they were entered by the defendant; that the east half of the north-west quarter of section 18 was entered by the defendant in the name of the complainant on the 9th day of December, 1837; and the east half of the north-east quarter,

and the north-east quarter of the south-west quarter, amounting to about one hundred and twenty acres, still belong to the United States. The bill further charged that when the defendant proposed to sell the land on the 15th day of July, 1836, he represented that there was a fine spring of excellent water upon it, which representation was untrue; that complainant resided in Yazoo county, about one hundred and fifty miles from the land office in Columbus when the land was entered; that he knew nothing about the title and relied entirely upon the representations of the defendant; that becoming satisfied the defendant never would make him a good title to the one hundred and twenty acres still owned by the government, after he had paid in full the note that fell due on the 1st day of January, 1838, he instituted suit in the circuit court of Choctaw county to the September term, 1841, on the title bond; that pending the suit the defendant proposed to him that they should submit to arbitrators, to be chosen by themselves, the question of how much should be allowed him on account of the failure of title to the one hundred and twenty acres, and at the earnest solicitation of the defendant he acceded to the proposition, and the question was referred to arbitration; that the arbitrators were not able to agree on the sum to be allowed complainant, and the defendant proposed to him and urgently pressed him to agree to divide the difference between the arbitrators; that not knowing what was the difference between the arbitrators, and supposing the defendant to be equally ignorant on that point, as he at the time assured him he was, complainant agreed to divide the difference between the arbitrators, and that their award should be made accordingly, which agreement was made known to the arbitrators, and they made an award allowing complainant six hundred dollars to be deducted from the purchase-money of the land; that the award was given to the clerk of the circuit court of Choctaw county, and by him entered on the minutes of the court as a part of the proceedings in the action on the bond; that in pursuance of the award, the defendant allowed him a credit of six hundred dollars, and he, on the 29th day of September, 1841, executed a new note for the sum of thirteen

hundred and fifty dollars, in favor of the defendant, and took up the old note which was still unpaid. The bill charges that it was distinctly understood and agreed between the parties that neither should select an arbitrator whose opinion on the question to be submitted was known to him; that in violation of their agreement the defendant selected an arbitrator whose opinion was well known to him at the time; and the complainant has since ascertained that when the defendant proposed to divide the difference between the arbitrators he understood perfectly well the grounds of their difference and all about it; and that the defendant acted fraudulently and unfairly, in procuring the award to be made more unfavorably to the complainant than in justice and equity it ought to have been. The bill further charged, that notwithstanding the fraudulent conduct of the defendant, in the procurement of the award, he was wholly unwilling to surrender up the note for thirteen hundred and fifty dollars; that he commenced suit on it and would proceed to collect it unless enjoined by the court; that the defendant was insolvent, &c. The prayer was that the award be set aside; the suit instituted by the defendant be enjoined; the note for \$1350, cancelled; that the contract for the sale of the land be rescinded or declared void; and the defendant be compelled to return the money paid him by the complainant; and that the land be sold for the payment thereof. An injunction was granted on this bill by the Hon. J. M. Howrey. The defendant answered, denying that he made any false representations, or in any manner imposed on the complainant, either in regard to the quality or title to the land; a fair opportunity was given to the complainant to examine the quality of the land for himself, and he bought on his own judgment. Respondent stated that when he sold the land he thought the spring referred to was on it; he had been so informed by Lindsay, from whom he purchased that portion of the land near the spring, and he expressed that opinion to the complainant at the time of the sale; he had since ascertained, however, that the spring was very near the line, but not on the tract sold to complainant; that when he sold he believed he had entered the 120 acres,

which still belong to the government; that in the summer of 1836, he intended to enter it, and when he sold he thought he had done so, but by mistake, range 8 was inserted in the certificate of entry instead of range 9, the land being correctly described in all other respects; that when the sale was made, neither he nor the complainant was aware of the mistake; they both then believed the certificate embraced the land intended to be sold, and a transfer was made of the certificate at the time to the complainant. Respondent admitted the sale was verbally agreed upon on the 15th day of July, and completed and writings executed on the 6th day of October, 1836; he admitted he had not, when the first agreement was made, a title to all the land, and that was the reason why a bond for title to be made at a future time was given; that a portion of the land was entered by Lindsay, and a portion was owned by White, of which facts he informed complainant, but he told complainant he could easily purchase it from them; he stated that he did make the purchases from Lindsay and White as it was agreed between the complainant and himself he should do; that after his purchase the complainant discovered some defect in the title obtained from Lindsay, and with the knowledge and consent of the complainant, he on the 9th day of December, 1837, entered that part to which the title was defective, in the name of the complainant, and the complainant then said he was perfectly satisfied. Respondent further stated that the title to all the land he sold the complainant, except to the 120 acres above mentioned, was then perfect, and he could and would have had the mistake in regard to the 120 acres corrected, and thereby rendered the title to the whole tract perfect, had not the complainant commenced suit on the title bond without giving notice to respondent, or allowing him time to have the mistake corrected. Respondent admitted that during the pendency of the suit, he made a proposition to submit the question in controversy between them to arbitrators, but he denied positively that he knew the opinion of the arbitrator selected by himself, or was guilty of any fraud, or practised any unfairness in the procurement of the award; he insisted that the award was fairly made

in pursuance of an agreement between the complainant and respondent voluntarily entered into, without any misrepresentation, or undue influence made or attempted to be used by respondent. He denied all the charges of fraud and misrepresentation contained in the bill. Several letters and written documents were filed with the answer as exhibits, which corroborated the statements of the respondent. The evidence was very voluminous, but we only notice that portion of it which bears upon the point on which the opinion of the court turned. Only three witnesses were examined upon the subject of the award, and all on behalf of the complainant. The first examined was Thomas I. Lindsay, who stated that he heard Roberts say, after the arbitration, that he could have had the mistake in the certificate of entry, intended to embrace the one hundred and twenty acres, the title to which was not perfect, corrected, and the complainant ought to pay the balance of the money, meaning the six hundred dollars allowed complainant by the arbitrators; and he appeared to be dissatisfied with the award. James Wellons testified that he was one of the arbitrators, and the question submitted to them, was the amount that ought to be allowed the complainant, on account of the failure of title to the one hundred and twenty acres of land still owned by the government; that after an investigation of the case, he believed it was in the power of the defendant to perfect the title, and it being admitted by both parties that the failure of title occurred by mistake, he, witness, was not willing to allow any deduction from the note of complainant, nor to release the defendant from the obligation of his bond; that the defendant asked him a great many questions both before and after the arbitration; but witness could not say with certainty, whether the defendant asked his opinion on either the legal or equitable principles involved in the case; he might have asked it, but witness could not say whether he did or not; that both parties agreed to abide the decision of the arbitrators, but after the new note had been executed, he heard the complainant express dissatisfaction with the result of the award; that the arbitrators did not act under oath, the parties having

Edwards v. Roberts.

consented that they need not be qualified. Witness further testified, that the arbitrators not being able to agree, William Cothran, the other arbitrator, being of the opinion that the complainant should be allowed twelve hundred dollars, T. S. Ayres was called on to act as a third arbitrator, but becoming dissatisfied he retired, and refused to act further; the parties then agreed that witness and Cothran should split the difference between them, and the award was made in that way. William Cothran proved that he was one of the arbitrators; that they did not act under oath, nor were the witnesses who were examined by them sworn; there was no written agreement or obligation entered into by the parties to abide by the award, though they verbally agreed to do so; he did not know whether the award was made in conformity to the rule of the court submitting the case to arbitration, or not, as he had no recollection of ever seeing the rule of the court; that the arbitrators could not agree, James Wellons being unwilling to allow the complainant any damages, and witness in favor of allowing him twelve hundred dollars; and the parties learning there was no possibility of an agreement between the arbitrators, came to the arbitrators, and informed them they had agreed that the arbitrators should divide the difference between them, and make that the award, — and the award was made in that way; that he never, either at or before the time of announcing the award, communicated to Edwards any fact connected with it; that at the time the award was announced, Edwards expressed no dissatisfaction with it, but subsequently he did express dissatisfaction on account of the small amount of damages allowed him. On cross-examination, he stated that, at the time of the arbitration it was stated by the defendant and admitted by the complainant, that the defendant had intended to enter the one hundred and twenty acres of land sold to the complainant, but by mistake had entered different land, and no fraud was charged against the defendant on that account, the only fraud then complained of was in relation to the quality of the land. In this condition the case was submitted to the vice-chancellor, who rendered a final decree at the June term, 1845, deciding

Edwards v. Roberts.

that the parties having agreed to submit the matters in controversy between them to arbitration, the award of the arbitrators being entered as a judgment of the circuit court of Choctaw county, was valid and binding upon the parties, and that if any fraud had ever existed, it was waived by the arbitration; that the injunction should therefore be dissolved and the bill dismissed at complainant's costs. From which decree the complainant appealed to this court.

Acee, for appellant.

The defendant's counsel objects to the relief sought on three grounds:

1. That complainant has waived the fraud, by long and tame acquiescence.

2. That the award made by the arbitrators precludes the complainant from seeking redress.

3. That by submitting to said award, and acting under it, the complainant has *confirmed* the *original* contract, and by that means has rendered it valid and binding.

The first position is neither sustained by the facts of the case, nor the law. For the bill charges and the answer admits, that there were two representations made, one as to the quality of the land and the other as to the title. And the bill charges and the answer admits, that so soon as complainant discovered that no title could be made to the one hundred and twenty acres of land, owned by the general government, that he sued on the bond given by defendant, for title.

So many misrepresentations were made by Roberts, as to the boundary, quality and titles to the land sold, that some two or three years elapsed before they were all discovered to be false. So soon as complainant ascertained, that the *title* was defective, he sought relief in the proper court.

In the case of *Grundy v. Boyces' executors*, 3 Peters, 210, Grundy *rested* more than three years before he took any steps to have the contract rescinded; and even then he did not act until he had permitted a judgment to be recovered against him on the notes given for the purchase-money, without making any de-

fence in the court which, having taken cognizance of the case, had the right to grant the relief.

The case in *Smedes & Marshall*, relied on by defendant's counsel, is not a case in point. In that case the question of delay or long neglect did not arise.

As to the 2d objection, I will barely add, that the bill, answer and depositions, all prove that there was no award. The arbitrators could not agree; and the parties decided the matter between themselves by agreeing that they (*Edwards and Roberts*,) would divide the difference.

But even admitting that an award was made; how was it made, and under what circumstances? The deposition of *Wellons*, the arbitrator on the part of *Roberts*, proves clearly that *Roberts* had ascertained his legal opinion upon the very question involved in the dispute, before he selected him. The fact that *Wellons* was willing to allow complainant nothing, and at the same time release *Roberts* from making a title to one hundred and twenty acres of land, according to the tenor of his bond, when the same had cost complainant \$1200, is so striking an instance of misjudgment or gross partiality, as to avoid the award, even if good in other respects.

"If the misjudgment of the arbitrator amounts either to partiality or corruption, the award will be set aside." *Ewing's Adm'r v. Beauchamp*, 2 Bibb, 456; Am. Dig. 178, sec. 9.

"So, if the assessment of damages be so erroneous as to induce the belief that the arbitrators must have been grossly partial, their award will be set aside." *Van Certlandt v. Underhill*, 17 Johns. 405.

"An award obtained by false statements, may be set aside in chancery, although the party complaining of such an award, assented to the admission of such statements." *Buckly v. Starr*, 2 Day's R. 553; Am. Dig. sec. 3, 177.

"Where a submission to arbitration, was by rule of court, the conduct of the arbitrators, and the parties to the submission may be examined, and if, on examination, it appeared that the arbitrators had been partial and unjust, or had mistaken the law, the court will not enforce a performance of the award.

 Edwards v. Roberts.

1 Saund. R. 327; 1 Salk. 71; *Forster v. Brunett*, 1 Mod. 21; *Darbyshire v. Cannon*, 2 Bur. 701.

But the award itself is bad, because it is not responsive to the submission. The matter submitted to the arbitrators was, "what deduction should be allowed on the notes given by complainant to defendant, for complainant to release defendant from his obligation to make titles to the one hundred and twenty acres mentioned and specified in the bond?" And the award requires complainant to release the defendant from his obligation to make titles to one hundred and twenty acres "not included or mentioned in the bond."

"An award is bad, if made of matters not within the submission." *Fisher v. Pembly*, 11 East R. 188; 1 Saund R. 32, a.

"And such an award is void." 2 Story's Eq. 682, 713.

"An arbitrator can be made a witness respecting everything that occurred." Story on Eq. Pl. 235, 323, 519, 825; *Reeve v. Farmer*, 4 Term R. 146; *Shepherd v. Merrill & Tucker*, 2 Johns. Ch. R. 276.

As to the 3d objection, that the complainant has confirmed the original contract, and thereby rendered it valid, by acting under the award; it will only be necessary to say that the contract being in part for the sale of public lands, or lands belonging to the United States, was illegal, being against public policy, and therefore incapable of confirmation. When the contract was made in July, 1836, two-thirds of these lands were vacant public lands; when the bond for titles were executed at least two hundred acres were in the same condition, and when the pretended award was made, at least one hundred and twenty acres still belonged to the general government; all the notes were tainted with the illegal contract, and were therefore void.

"A promissory note, given in consideration of the purchase of an improvement upon vacant public land, is for an illegal consideration, and an action cannot be sustained thereon." *Merrill v. Legrand*, 2 How. 150.

"All agreements, bonds, or securities given for, or in viola-

tion of a public law, &c., are deemed incapable of confirmation or enforcement." 1 Story's Eq. 294.

"And the general rule is, that whenever any contract or conveyance is void, either by a positive law, or upon principles of public policy, it is deemed incapable of confirmation." 1 Story's Eq. 303.

"If the original contract be illegal or usurious, no subsequent agreement or confirmation of the party, can give it validity." 1 Story's Eq. 338, 339. See Note 2—338, 339.

Surely if the sale of an improvement on vacant public land, is an illegal act according to the decision in *Merrill v. Legrand*, because it contained a trespass, a sale of the land itself is also illegal, and the contract absolutely void and incapable of confirmation.

William G. Thompson, for appellee.

In September, 1841, the parties submitted the matters of difference between them to arbitration, and had the award entered of record as the judgment of the court. The point in dispute, as Edwards states in his bill, was in regard to one hundred and twenty acres of the land, the title to which was in the government. The award was, that Edwards should be allowed a credit of \$600 on account of this defect of title. He submitted to, and confirmed the award, by substituting a new note, deducting \$600, for the note last falling due, given at the time when the contract was made. There is no proof that Roberts acted in anything fraudulently or unfairly in procuring the award; there is no proof that by the award the new note was to be for a less sum than it was given for. We deem it unnecessary to argue the question, whether the award be in itself, legally valid and binding. The whole proceeding constituted an agreement between the parties, valid and binding, by which Edwards was to waive all objection to the contract, on the ground of failure to make title to the one hundred and twenty acres, in consideration that Roberts would allow him a credit of \$600 more than he had paid on the purchase-money. This agreement was fully executed on Edwards' giving the substituted note. And as there

is no pretence in the bill that Edwards had not at this time a perfect title to the rest of the land, we contend that by giving the substituted note under the agreement in relation to the award, he thereby waived all objections of whatever sort to the contract; and that he is bound by his executed agreement, and will be held to it. There is no ground for rescission set forth in the bill, which did not exist, if at all, at the time the contract was made.

William Thompson, on the same side.

Mr. Justice **TEACHER** delivered the opinion of the court.

This is an appeal from a decree of the vice-chancellor of the northern district.

The bill is based upon allegations of fraud in a contract for the purchase of land, consisting in misrepresentations by the vendor both as to the quality and title. The bill likewise charges fraud in obtaining an award under arbitration upon matters connected with the original contract.

It is a well established position, that if a party has a knowledge that he has been defrauded, and yet subsequently confirms the original contract by making new agreements and engagements respecting it, he thereby waives the fraud and abandons his claim to equitable relief. 2 Ves. Sr. 126; 9 Ves. 364; Fonbl. Eq. 129, note *r*.

Roberts having given Edwards a bond to make a title to the lands embraced in the purchase, and Edwards conceiving he had just fears that Roberts would be unable to make him a title to the whole of the land embraced in the purchase, to wit, one hundred and twenty acres of land, the title to which was still in the government of the United States, instituted an action upon the title bond. Pending this action, the parties mutually agreed to submit to arbitration what amount of deduction of the original purchase-money should be allowed to Edwards in consideration of the premises. While this arbitration was proceeding, it was ascertained that the arbitrators were unable to agree upon a decision, and the parties then further agreed to divide

the difference that subsisted between the arbitrators. In accordance with this latter agreement an award was made allowing Edwards a deduction of \$600 upon the original amount of his purchase-money. This award was duly recorded as a part of the action upon the title bond. It was however, insisted by Edwards that Roberts took undue means to procure the result of the arbitration by engaging the services of an arbitrator whose opinion he had ascertained was already favorable to his interests; but this is strenuously denied by Roberts in his answer, and is not substantiated by the evidence in the cause.

Whatever, therefore, may be the merits of the original position assumed by Edwards, respecting the charge of fraud having been practised upon him in the purchase, the fact of his having consented to abide by the result of an arbitration upon the matters in dispute, and above all the circumstance that he acted upon the award, however unwillingly, and gave a new note to Roberts in accordance with the terms of that award, constitute such a re-affirmance of the contract as was a virtual relinquishment of any right to relief which he might up to that time have possessed.

Decree affirmed.

JOHN MONTGOMERY vs. JOHN W. P. MCGIMPSEY ET AL.

Where a judgment of the circuit court is affirmed by the judgment of the high court of errors and appeals, the lien of the former is not destroyed.

A purchaser, under an execution issued by the clerk of the circuit court, against the principal and sureties on the writ of error bond, upon the certificate of the clerk of the high court of errors and appeals, of an affirmance by that court, of a judgment of the circuit court, of land mortgaged by the judgment debtor between the time of the rendition of the judgment in the circuit court and its affirmance by the high court of errors and appeals, acquires a superior title, and will be preferred to the mortgagees.

Where a judgment of the circuit court is affirmed by the judgment of the high court of errors and appeals, with damages, and land, which was mortgaged by the judgment debtor after the rendition of the judgment in the circuit court, but before the judgment of affirmance by the high court of errors and appeals, was sold under an execution issued by the clerk of the circuit court on the certificate of the clerk of the high court of errors and appeals, of the affirmance of the judgment, for enough to satisfy the judgment, damages, and costs; *held*, that the purchaser acquired a title unincumbered by the mortgagee, and the most that the mortgagee could claim would be the amount of the damages as a sum not covered by the older judgment lien, and that must be claimed of the judgment creditor, and not of the purchaser.

On appeal from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

John Montgomery filed a bill in the superior court of chancery, alleging that he was the surety of John W. P. McGimpsey on various notes for large sums of money in favor of Briggs, Lacoste & Co. and others; and to indemnify and save him harmless against loss, McGimpsey, on the 22d day of November, 1839, executed to him a mortgage on fifteen hundred and sixty acres of land, lying in the county of Madison, in the probate court of which county the mortgage was duly recorded on the 16th day of December, 1839; that the notes upon which he was surety, were due and unpaid, and suits were pending

against him thereon; that James Dick, Richard S. Booker, William I. McLean, and Henry R. W. Hill, copartners under the name and style of N. & J. Dick & Co., were in the possession of the mortgaged land, claiming it under some title or pretence of title derived through McGimpsey, or in some other way, and their title, if they had any, was alleged to be junior and inferior to that of the complainant. McGimpsey, the various creditors, and W. & J. Dick & Co. were made defendants; and the prayer was, that the title of N. & J. Dick & Co. be cancelled, and declared inoperative; that the mortgage be foreclosed, and the land sold for the payment of the debts. The bill was taken for confessed against all of the defendants except W. & J. Dick & Co., who answered, denying that they had any knowledge of the allegations of the bill concerning the notes and mortgage, but admitting they were in possession of the land, and insisting that they were the lawful owners of it; that they derived title to it in the following manner, to wit: That on the 1st day of May, 1838, James H. Scott recovered a judgment in the circuit court of Madison county, against Vincent Moore and John W. P. McGimpsey, for four thousand dollars debt and one hundred and three dollars and eleven cents damages, upon which an execution was issued on the 17th day of August, 1838, when the defendants filed a bill in the superior court of chancery, enjoining all further proceedings under the judgment and execution at law; that at the January term, 1839, the chancellor dissolved the injunction, and an alias execution was issued on the judgment at law, which execution was superseded by the defendant McGimpsey, and a writ of error prosecuted by him to the high court of errors and appeals, which court, at the January term, 1840, affirmed the judgment of the circuit court of Madison county, with damages; that on the 14th day of May, 1840, a pluries execution was issued, which was levied on the land described in the bill, and upon the sale thereof by the sheriff of Madison county, they, respondents, became the purchasers. A transcript of the record of the circuit court of Madison county was made an exhibit to the answer, and sustained the various allegations contained in the an-

swer. The certificate of the clerk of the high court of errors and appeals of the affirmance of the judgment of the circuit court of Madison county, was set out in the record, and was in the words and figures following, to wit :

"The state of Mississippi, high court of errors and appeals; January term, A. D. 1840. John W. P. McGimpsey, plaintiff in error, *vs.* James H. Scott, defendant in error.

"This cause having been duly considered by the court, it is ordered and adjudged, that the judgment of the circuit court of Madison county against the plaintiff in error, for the sum of (\$4103.11,) four thousand one hundred and three dollars and eleven cents, be, and the same is hereby affirmed; whereupon it is considered by the court, that the defendant in error do have and recover of said plaintiff in error, principal, and M. D. Shelby, and John B. Moon, securities in the writ of error bond, the sum of (\$4103.11) four thousand one hundred and three dollars and eleven cents, being the amount of the judgment above recited, with legal interest thereon, from the date of the rendition of said judgment till paid; also the further sum of (\$410.31,) four hundred and ten dollars and thirty-one cents, being ten per cent. damages on the amount of said judgment; together with all costs that may have have accrued thereon in the court below. It is further considered by the court, that the defendant in error recover of said plaintiff in error and the said securities in the writ of error bond, his costs by him about his suit in this behalf expended, to be taxed by the clerk of this court.

"I, Robert A. Patrick, clerk of the court aforesaid, do hereby certify the above to be a true copy from the original judgment, as entered upon the minutes of said court. Given under my hand and seal of said court, this 7th day of May, A. D. 1840.

"R. A. PATRICK, Clerk.

"By F. G. Hopkins, D. C.

"To the clerk of the circuit court of Madison county."

The pluries execution issued by the clerk of the circuit court of Madison county was in these words, to wit :

Montgomery v. McGimpsey et al.

"The state of Mississippi to the sheriff of Madison county, greeting : — We command you that, of the goods and chattels, lands and tenements of John W. P. McGimpsey, M. D. Shelby, and John B. Moon, late of your county, you cause to be made the sum of four thousand one hundred and three dollars and eleven cents, which James H. Scott lately, on an affirmation of a judgment of the circuit court of Madison county, by the high court of errors and appeals of the state aforesaid, recovered against the said John W. P. McGimpsey as principal, and M. D. Shelby and John B. Moon as securities in the writ of error bond, with interest at the rate of eight per cent. per annum on said sum from the first day of May, 1838, until paid ; together with the sum of four hundred and ten dollars and thirty-one cents, it being ten per cent. damages on the aforesaid sum, which was adjudged by said high court of errors and appeals to the said James H. Scott against the said John W. P. McGimpsey, M. D. Shelby, and John B. Moon ; also the sum of twenty-seven dollars and forty-three and one half cents for his costs by him about his suit in that behalf expended, whereof the said John W. P. McGimpsey, M. D. Shelby, and John B. Moon are convicted, as appears to us of record ; and that you have the money before the judge of our said circuit court at the court-house of said county, in the town of Canton, the first Monday of November, 1840, to render to the said James H. Scott for debt, damages and costs as aforesaid ; and have then and there this writ. Witness, Isaac R. Nicholson, judge of this seventh judicial district of said state, at the court-house of said county, the first Monday of May, 1840, and seal of this court. Issued the 14th day of May, 1840.

" WILLIAM MONTGOMERY, Clerk.

" By William Riley, Deputy."

Upon which execution the sheriff made the following indorsement and return, to wit : " In pursuance of the mandate of this writ to me directed, I have levied said *fi. fa.* on the following tract or parcel of land of defendants, to wit : — " (Setting out a description of the land by sections, parts of sections, town-

Montgomery v. McGimpsey et al.

ship and range, containing in all four thousand nine hundred acres, and including the land described in the mortgage to the complainant, and continues thus :) "By virtue of this writ to me directed, I have this day caused to be made of the lands and tenements of the within-named J. W. P. McGimpsey, plaintiff's money in full, and all costs in this case.

"SAMUEL HAMBLIN, Sheriff.

"July 20th, 1840."

On the 30th day of March, 1843, the complainant filed an amended bill, reciting the substance of the original bill, and alleging that since the original bill was filed, judgments were recovered against him on two of the largest notes upon which he was surety for McGimpsey, and he had paid them both in full, and had one of the judgments assigned to him; and that the other notes had been paid and discharged, as he had been informed and believed, by McGimpsey. The amended bill was taken for confessed. On the 25th day of January, 1844, the cause was referred to the clerk of the court, to ascertain the amount of principal and interest due the complainant on the notes and mortgage in the bill mentioned. On the 27th day of January, 1844, the clerk reported, that there was due the complainant seventeen thousand and ninety-seven dollars and forty-five cents; and on the 30th day of the same month that report was confirmed by the court. Upon the foregoing pleadings and evidence, the cause was submitted to the chancellor, who, on the 7th day of June, 1844, rendered a final decree, dismissing the bill, from which decree the complainant prayed an appeal to this court.

Daniel Mayes, for appellant.

It seems to have been taken for granted, that we proceed on the hypothesis, that the execution of the supersedeas bond and judgment by this court, extinguished the lien of the judgment of the Madison circuit court, and the cases of *Kilpatrick v. Dye's heirs*, 4 S. & M. 292; and *Planters Bank v. Calvit*, 3 Ib. 143, are relied on.

The point of defence is not the point of attack. We admit that the judgment of the Madison circuit court retained its lien. But Dick & Co. do not claim under that judgment. The *fi. fa.* exhibited by them, issued on and to carry into execution a judgment of this court, between other parties, for a different sum, and founded on a different cause of action. Had Scott sued on the bond for supersedeas, and obtained his judgment in that action, and sued out his *fi. fa.* on that judgment, could a purchaser have held against Montgomery's mortgage, executed and recorded prior to the judgment? And if not, in what does this case differ from that? Only in the manner of proceeding to judgment, and the court in which that judgment is obtained. We contend that Scott had two judgments, one of the Madison circuit court, for \$4103.11, on a promissory note executed by Vincent Moore and McGimpsey. Another in this court for \$4103.11, and \$410.30, founded on a writ of error bond executed by McGimpsey, Shelby, and John B. Moon. By the former the promissory note was merged, by the latter the bond for supersedeas was merged. Scott might have elected to enforce the lien of the former by suing out an execution thereon, and having made his \$4103.11, with its interest and the costs of that suit, he might have sued out an execution on the judgment of this court, and levied his damages, adjudged by this court. Had he done so, and Dick & Co. been the purchasers, could they have set up successfully the judgment of Madison as creating a lien, as to the damages recovered in this court? And they have attempted that; for if they purchased at all, they purchased as well for the damages as for the original debt. The purchase was one and entire, according to them. Now, how shall it be apportioned?

If they can successfully claim under the original judgment, it is because the judgment created a lien greater by \$411.30 than itself.

And if they can successfully claim under the judgment of this court, it will be, that it had a lien anterior to its own existence. Montgomery's mortgage was certainly entitled to priority over the judgment for damages.

The judgment of this court is an entire thing; and yet to sustain Dick & Co. it must have a different operation as to some of the defendants, from its operation as to others. It must be a lien on McGimpsey's estate from the time the judgment of Madison court was rendered, and as to Shelby & Moore, from the date of the judgment of this court.

It is an attempt to introduce a doctrine more obnoxious than that of *tacking* in case of wages. Scott might rightfully elect to proceed by *fi. fa.* to enforce the lien of the judgment of this court. He did so proceed. And Dick & Co. having purchased under that judgment, cannot *tack* it to the judgment of Madison, and thus in the language of the books *squeeze out* Montgomery. I rely on *Scriba v. Deans*, 1 Brock. R. 169, as an authority for the principle for which I contend. But it is not necessary to labor this point. We deny that the sheriff sold an acre of the land embraced in our mortgage, and if he did, we deny that Dick & Co. purchased it. They rely on a purchase under judgment, and must show such purchase. They show no such thing; they only show that the execution was fully satisfied, and the money levied of the land and tenements of McGimpsey; what land, how much land, or who was purchaser we know not.

The report of the commissioner which has been confirmed, shows the amount of money due Montgomery, and it is asked that this court decree a foreclosure and sale for its payment, and enough will probably remain fully to reimburse Dick & Co., if they purchased and remain as true to their interests as they have heretofore been.

Montgomery and Boyd, on the same side, cited H. & H. 532, 533 and 535; 4 How. R. 631, and 1 Paige's R. 558.

Tarpley, for appellees.

Two points are presented by the record in this case.

1. Does the writ of error, suspending the execution, operate as a discharge of the lien.

2. Is the affirmance of the judgment in this court, and the recovery against the securities in the writ of error bond such a

new and independent judgment as discharges and vacates the original judgment.

In the case of *Smith et al. v. Everly et al.* 4 How. 185, the court determined that the act of 1824 was a lien from the rendition of the judgment, which could only be defeated or postponed by some act of the creditor, which act was fraudulent in law as against other creditors. But the lien thus created could never be lost by the improper or fraudulent act of the debtor. This rule is laid down by the court as applicable to the operation of judgments enjoined by the court of chancery; and to sustain the position the court relies upon the statute. Rev. Code, 95; *Lynn v. Gridley*, Walker's R. 584⁴; and *Conway v. Jett*, 1 Mart. & Yerg. 373. The same rule applies to writ of error bonds. The operation of the judgment in both cases is merely suspended, subject to be restored to all its functions upon the dissolution of the injunction or the affirmance of the judgment. In the case of *Overton v. Perkins and others*, Mart. & Yerg. 370, the court lays down the position that the creditor cannot be ousted of his legal rights by the fraudulent conduct of the debtor. *Blumfield's case*, 5 Coke, 87; *Lusk v. Ramsey*, 3 Munford's R. 54; 18 Johns. 311, 363. And where property has once been levied on the creditor has a right to have his judgment satisfied by the sale of the same, unless he be guilty of some default by which he loses his lien. 1 Salkeld, 322; 1 Burrow, 34; 3 Munford, 441. And the same rule applies to judgments from the date of their recovery in this state under the statute of 1824, as does in England by virtue of a levy of the execution. By the statute in Tennessee it was made the duty of the clerk, upon a dissolution of the injunction, to enter up judgment against the principal and securities in the injunction bond, which, according to the dictum of Judge Trotter, in *Smith v. Everly*, "might be considered a more comprehensive remedy, and analogous to a judgment on a forfeited forthcoming bond." And yet in *Overton v. Perkins et al.* the court lays it down as a well-settled rule, that the rights of the plaintiff at law on the dissolution of the injunction shall stand on the same grounds it did when it issued. See Douglas, 71; Burrow, 660; 2 Bla. R. 784; 2 Bay, 123; Peck, 54.

Both points in the argument have been fully answered by this court in the case of *The Planters Bank v. Calvert*. It was there determined that the affirmance of a judgment in this court against the defendant in the court below, and also against the securities in the writ of error bond, was neither a satisfaction, a merger, or an extinguishment of the judgment below, and therefore did not interfere with the lien created by the judgment. And for the plain reason that, although the law annexes certain incidents to the affirmance of a judgment, it does not change its character, it but declares that the court below did right, and the law therefore attaches a cumulative remedy by judgment against the securities in the bond. Nor does "this new and more comprehensive remedy" have any analogy to a judgment on a forfeited forthcoming bond, so as to destroy the lien of the original judgment, because a bond is never taken without a levy of the execution, and a levy is a legal satisfaction. So that in every point of view the opinion of the chancellor is fully sustained by the repeated decisions of this court, and the numerous authorities upon which those decisions have been predicated. See also *Kilpatrick v. Dye's heirs*, 4 S. & M. 292; *Morton v. Simmons*, 2 Ib. 604.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This is an appeal from the superior court of chancery, in which the bill was filed by Montgomery, under the following circumstances. Previous to the 2d of November, 1839, he had become bound, with others, as surety for McGimpsey for a very large amount of money due to various persons, all of whom are made defendants. On that day McGimpsey executed to him a mortgage on about eighteen hundred acres of land, as an indemnity against his several liabilities. The bill charges that Dick, McClean, Booker, and Hill, pretend to claim title to the land; which, if they have any, was acquired by virtue of some lien posterior in point of time to his mortgage. None of these debts had been paid when the original bill was filed; but an amended or supplemental bill was filed after several of the debts were paid.

The prayer is, that the incumbrances may be declared inoperative, and for a foreclosure.

None of the defendants answered, except Dick and Hill, who claim title to the land as purchasers at execution sale, under a judgment older than the mortgage. The answer, with the exhibits, discloses this state of facts: On the 1st day of May, 1838, James H. Scott recovered a judgment against McGimpsey in the circuit court of Madison county, for \$4000 debt, and \$103 11 damages. An execution issued, and was placed in the hands of the sheriff, who was stopped from proceeding by an injunction from the superior court of chancery. The injunction was dissolved, and another execution issued, when the defendant McGimpsey sued out writs of error and supersedeas, and the case was brought to this court, when, at January term, 1840, the judgment of the circuit court of Madison county was affirmed, and judgment entered against the principal and his sureties for the amount of the judgment of the circuit court, (\$4103 11) and ten per cent. damages. This was certified by the clerk of this court to the clerk of the circuit court of Madison county, who issued an execution against the principal and sureties, which recites that the judgment of this court was rendered in affirmance of the judgment of the circuit court of Madison county. This execution was levied by the sheriff on four thousand nine hundred acres of land, which was particularly described by numbers according to the surveys, without specifying to whom it belonged. Then follows a general return of the sheriff, that by virtue of the writ he had caused to be made of the lands of McGimpsey the plaintiff's money in full and costs. The land claimed under the mortgage was embraced in the levy.

It requires but a few remarks in addition to this history of the case to decide it. The judgment was older than the mortgage, and was of course the first entitled to satisfaction. The lien of the original judgment was not destroyed by the judgment of affirmance rendered by this court. The only question is, does the execution issued on the certificate of affirmance from this court so connect itself with the original judgment as

to show the identity of the judgment affirmed with the judgment rendered in the circuit court on the 1st of May, 1838. The records are made exhibits to the answer, and from them it is plain that the execution under which the land was sold was issued on the original judgment, in the manner prescribed by the statute. When the whole case is looked into, the foundation of the execution is at once seen.

But it is objected that the damages rendered by this court did not constitute a lien which was entitled to priority over the complainant's mortgage. This may be true, but still that would not alter the case. The land was sold under a lien which was older than the mortgage, to wit, the original judgment, and of course, in the face of that sale, the chancellor could not have decreed a foreclosure. If the land sold for the amount of the original judgment and damages, the most that the complainant could claim would be the amount of the damages as a sum not covered by the older lien, but subject to his mortgage, as a surplus produced by the incumbered property over and above the amount of the preferred incumbrance. But there is a conclusive answer to this; there were four thousand nine hundred acres of land sold, when complainant had a lien on only eighteen hundred acres; he cannot therefore say that the mortgaged premises sold for more than enough to satisfy the judgment lien. But even if he were entitled to a surplus, who is liable for it? Surely not the purchaser. The judgment-creditor should be called on to refund, but he is not a party to the bill.

The decree of the chancellor is affirmed.

JOHN STEWART vs. RAYMOND RAILROAD COMPANY.

If the owner of land through which a company wishes to run a railroad, agree to refer to arbitrators the question of damages to be paid by the company for the right of way, and there be no express agreement that time shall be given for the payment of the damages awarded; the damages must be paid, before the right of way can vest in the company.

He who seeks to compel a specific performance of a contract, must do all that is incumbent upon him, or he cannot succeed. Where, therefore, a railroad company, agreed with the owner of land to refer to arbitrators, the question of how much the company shall pay him for the right of way over his land; they cannot prevent him from the exercise of full ownership over the land until they have paid, or tendered to him the damages awarded.

A purchaser of land who, at the time of purchase, executed a deed of trust to secure the purchase-money, cannot convey to a company, even an easement over the land, except subject to the payment of the purchase-money; when therefore such a purchaser did convey to a company an easement over the land, and the land was subsequently sold under the deed of trust, and the purchaser at the trust sale, agreed with the company to refer to arbitrators the question of damages they should pay him for the enjoyment of the easement; it was *held*, that the company were not entitled to an indefinite credit for the payment of the damages awarded, and to the enjoyment of the easement, until the payment of the money; but that they were bound to pay, or tender the amount of damages before they could have any right to the enjoyment of the easement.

The doctrine in regard to the dedication of land to public uses, has no sort of application to that class of cases arising out of the right of a railroad company to run their road through land, without first paying the owner thereof the damages awarded to him for their so doing.

Whether the road of a railroad company is subject to sale under an execution at law, *quære?*

Where a railroad company neglect to pay the owner of the soil the damages awarded him for their right of way through his land, and he is exposed to the transit of the cars of the company over his land for an indefinite period, with but little prospect of compensation, a court of equity can grant him an injunction, restraining them from the use of his land.

Stewart v. Raymond Railroad Company.

APPEAL from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

On the 27th day of February, 1841, the Raymond Railroad Company filed their bill in the superior court of chancery, alleging that when their road was commenced the farm of John Stewart was held and owned by John W. Covington, to whom Stewart had previously sold it, and upon which Covington had executed a deed of trust to secure the payment of the purchase-money; that on the 24th day of September, 1838, while Covington was in possession, he regularly deeded and gave them full right of way through the land, and they, apprehending no difficulty proceeded to make and lay their railroad; that during the month of ———, 183 , Stewart by virtue of the deed of trust, had the land sold, became the purchaser himself, resumed possession, and insisted that they should render him compensation for the injury done his farm, by the road; that not being able to agree on the amount of damages, they should allow him, it was agreed to refer the question to the arbitrament of their mutual friends; that the arbitrators awarded nine hundred dollars damages to Stewart, which sum they obligated themselves to pay, and proceeded to the completion of the road; that they regretted extremely that they were then wholly unable to pay him the sum they acknowledged to be due him, but they had no means of paying him, except from the receipts of the road, and they had tendered to him the whole receipts to commence in a short time, after paying some debts due to mechanics who had built the road, and which were privileged debts, but he refused to accept them; and that he appeared to be resolved, and had publicly threatened unless they paid him the amount due, he would run his fences across the road and prevent their use and enjoyment of it; that they were advised and believed he had no legal right to do so, and that although he might originally have prevented their running the road through his farm without first resorting to a writ of *ad quod damnum*, to assess his damages, yet as he had voluntarily waived that right, and consented to a friendly arbitrament of that question, he had no more right to obstruct

the operations of the road than any other general creditor of the company. They made John Stewart a defendant, and prayed that he should be enjoined and restrained from throwing any difficulties in their way in the use and enjoyment of their road, either by running fences across it; or otherwise. Upon this bill, the Hon. J. R. Nicholson granted an injunction, as prayed for by complainants. The defendant answered the bill, admitting that before the commencement of the railroad, he had sold his farm to John W. Covington, and took from him a deed of trust to secure the purchase-money; that on the 24th day of September, 1338, while Covington was in possession of the land, he conveyed the right of way; but he stated that the conveyance was voluntary, and without any consideration paid by the company, and conveyed only Covington's right; he also admitted that Covington, having failed to pay the purchase-money, he had the land sold under the deed of trust, and became the purchaser of it, and by such purchase he obtained the land back again clear of any legal incumbrance by any act of Covington; that he found the road running upwards of a mile through his land, and about three quarters of a mile through fields, lying along the rich bottom on the south-west side of Snake Creek, and very materially injuring his farm, and he therefore informed the company that they would not be permitted to have the right of way over the land, without compensation for the damage done his estate. He admitted that not being able to agree with the company on the amount of damages they should pay him, the question was referred to arbitrators, who awarded to him nine hundred dollars, but the arbitrators were required to assess the damages in cash, and there was no agreement, stipulation, or understanding that any credit should be given, or future time of payment fixed; that when the damages were assessed, he had a right to expect and did expect the company to pay him the money; that after repeatedly calling on them for his money, and offering to execute to them a deed, conveying to them the right of way through his farm if they would pay it, without being able to get anything from them; and not knowing any process by which he could

recover the damages, as the company owned nothing, he sent them notice that they might continue to use the road until the first day of March, 1841, on which day he would attend at the office of P. M. Alston, a justice of the peace, in the town of Raymond, to make them a deed, and receive his money, and if the money should not be paid on that day, he would forthwith extend his fences across the road, and prevent them from any further use of his land; that in January, 1841, he had a similar notice published in the "Raymond Times," a newspaper published in the town of Raymond; that he accordingly on the first day of March, 1841, caused a deed, duly acknowledged by him, to be deposited in the hands of Esquire Alston, in his office, and authorized him to receive the money, and deliver the deed to the company; that the company failed, and refused to pay the money, and he, in the afternoon of that day, closed the road, and about eleven o'clock that night, when he returned home, he found copies of the subpoena and injunction in this suit, which had been left with his wife during his absence. He finally insisted that his title to his land was exclusive, and none had a right to enter thereon without his consent.

On the third day of March, 1841, John Stewart, filed in the superior court of chancery, a bill against the Raymond Railroad Company, alleging substantially the same facts stated in the foregoing answer, and in addition setting out his claim of title to the land from the government of the United States, and praying for an injunction against the company, restraining them from entering upon or passing over his land. Upon this bill also the Hon. J. R. Nicholson granted an injunction. The answer of the company, admitted nearly all of the allegations of the bill filed by Stewart, and repeated the statements made in their bill against him; insisted that Stewart could only be regarded as a creditor at large, and entitled to no greater or higher powers, privileges, or immunities; and denied that he had any power or right to take away from or deprive them of the right of way through his land, after submitting to the arbitrament as above stated. They acknowledged the justice of

Stewart's debt, and urged their poverty as the only reason for its non-payment, and admitted that the company owned no property, except the road, and that they were indebted to various persons, but they believed the receipts of the road, if they were not obstructed in the use of it, would be sufficient to pay all their debts. Both cases were submitted to the chancellor at the same time, on the bills, answers, and exhibits; and he, on the 13th day of May, 1843, rendered a final decree, dissolving the injunction of Stewart, and dismissing his bill, and making the injunction granted upon the bill of the company perpetual. From which decree of the chancellor, Stewart appealed to this court

Foot and Hutchinson for the appellant, contended that Covington had no right to encumber the land to the prejudice of Stewart, and that the company had no legal or equitable right to enter upon, or pass over the farm of Stewart, without his consent. And that the decree of the chancellor, should unquestionably be reversed.

E. W. F. Sloan, for appellees.

The chancellor held that the grant from Covington at least gave the right of entry to the company, and having entered, they were exempt from the charge of being trespassers.

And though Stewart might have insisted upon a legal course to divest his title, and for the assessment of damages, and thus make the payment of the money a condition precedent to the right of the company to proceed. Yet that it is competent for Stewart to waive this, and to negotiate privately for the right of way. That as he did so, permitting the company to go on and complete the road, there was such a part performance of the contract as to render it binding upon all parties, and as would enable the company to enforce a specific performance.

The principle is well established, that a conveyance of the fee-simple is not necessary to pass the right of way. That right is an incorporeal hereditament, an easement, and may pass by parol. If even a private road be laid out pursuant to

legislative enactment, with the consent of the owner of the land, the proceeding will be valid. Nor need the consent of the owner be in writing, but it may be parol. 6 Hill's Rep. 47.

Stewart did everything necessary to constitute a dedication, and the law of dedication applies. A dedication to the public may be made in various ways, and for that purpose, a deed is not necessary. 2 Strange, 1004; 4 Camp. R. 16, 3 Bingham, 447. See *City of Cincinnati v. Lessee of White*, 6 Pet. 431, 437, where it was expressly held that no deed or writing, was necessary to constitute a valid dedication of the easement. Per Thompson, J. There is no particular form or ceremony necessary in the dedication of land to public use." All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation." And again, "after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted." *Vick v. The Mayor and Aldermen of Vicksburg*, 1 Howard, 380, is to the same effect. In fact the cases are all to the effect that simple assent, and consequent user, are sufficient to establish a dedication, or grant of an easement.

A railway for the accommodation of travellers, and the transportation of freight, is a public highway, 2 Barn. & Ald. 646, *Rex v. Severn*. And per Chancellor Walworth, in *Beekman v. Saratoga and Schenectady Railroad Co.* "It is objected, however, that a railroad differs from other public improvements, and particularly from turnpikes and canals, because travellers cannot use it with their own carriages, and farmers cannot transport their produce in their own vehicles; that the company in this case are under no obligation to accommodate the public with transportation; and that they are unlimited in the amount of tolls which they are authorized to take. If the making of a railroad will enable the traveller to go from one

574 HIGH COURT OF ERRORS AND APPEALS.

Stewart v. Raymond Railroad Company.

place to another without the expense of a carriage and horses, he derives a greater benefit from the improvement, than if he was compelled to travel over a turnpike road at the same expense." "The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf, and taking tolls for the use of the same. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they should refuse to transport any individual or his property without any reasonable excuse, upon being paid the usual rate of fare."

Mr. Justice CLAYTON delivered the opinion of the court.

The appellant Stewart sold to one Covington a tract of land in Hinds county, and took from him a deed of trust upon it to secure the payment of the purchase-money. Covington afterwards granted to the Raymond Railroad Company the right of way over this tract of land, so far as he had title, or power to do so. This seems to have been without consideration, and a mere gratuity. Subsequently the land was sold under the deed of trust, and was again purchased by Stewart. In the meantime the road had been constructed, and put in operation. A controversy then arose between him and the Raymond Railroad Company, as to the payment of damages, for the right of way over the land. By mutual agreement they referred the amount to arbitration, and the sum awarded to Stewart was nine hundred dollars. No part of this sum has been paid; and the company alleges its total inability to pay, as an excuse for its failure to do so. The appellant, on more than one occasion, sought payment, and finally gave a notice that unless the damages were paid by a specified day, he should close his fences and obstruct the passage of the cars. Before the day, the company obtained an injunction to prevent the obstruction of the way by Stewart. He then filed a bill and procured an injunction against the company, to prevent the running of the cars over his premises. The chancellor made the injunction of the company perpetual, and dismissed the bill of Stewart.

It is insisted in argument, that Stewart is a creditor at large of the company for his damages, and has no right to urge their payment as a condition precedent to the enjoyment of the right of way by the company. There was no stipulation in the contract for a credit, the presumption therefore is, that the damages were to be paid before the right became vested. If this were not the case, a man might be forced to part with his property, and never be able to obtain compensation. See *Thompson v. Grand Gulf R. R. and Banking Company*, 3 How. 240.

If not a condition precedent, the payment ought at least to have been a concurrent act, to perfect the right. He who comes into equity, must do equity. He who seeks to compel a specific performance, must do all that is incumbent upon him, or he cannot succeed. Viewed in this light, we do not perceive how the company can have right to prevent the full exercise of ownership by the complainant, until they pay or tender the amount of damages. Covington was not entitled to convey even an easement to the company, except subject to the payment of the purchase-money. He could place them in no better condition than he occupied himself. The company does not pretend that the purchase-money has been paid; neither does it deny its liability to pay the damages awarded. It only insists, that it is entitled to an indefinite credit, and to the intermediate enjoyment of the easement, until the money to pay can be made. We know of no principle to sustain this assumption; and the decree upon the bill of the company must be reversed, and the bill dismissed.

If the company has no right to the easement, before payment of the damages, the proposition that Stewart has a right to restrain the passage of the cars until such compensation, would seem to follow as an inevitable consequence.

The doctrine in regard to the dedication of land to public uses, has no sort of application to this kind of case.

The only question with us, is as to the power of a court of equity to interpose. An action at law would give no adequate relief, as the company is unable to pay, unless the road could

be made subject to the execution — about which we give no opinion.

The jurisdiction of equity to prevent waste, where no compensation can be had at law, seems to be established; especially "where the nature of the injury is such that a preventive remedy is indispensable, and where it should be permanent." 2 Story's Eq. 200. Unless such jurisdiction in this instance be exercised, Stewart is exposed to the transit of the cars over his land for an indefinite period, with but little prospect of compensation. It is a case, in our view, for equitable relief.

The decree of the court below is reversed, and the bill of the Railroad Company dismissed with costs. The bill of Stewart, together with its injunction, is directed to be retained in the chancery court for farther proceedings. Upon payment of the damages in reasonable time, that court will make a decree for the quiet enjoyment of the easement by the company; upon failure to make such payment, the injunction will be made perpetual.

Decree reversed.

ALLEN JENKINS vs. WILLIAM W. WHITEHEAD.

W. leased to J. a tract of land for ninety-nine years, and placed J. in possession, J. being fully acquainted with the nature of W.'s title at the time ; J. afterwards refused to comply with his contract, and abandoned the possession of the premises ; whereupon W. sued him, and recovered judgment at law for the consideration of the lease. J. then filed a bill to set aside the lease, recover back the money he paid on it, and to enjoin perpetually the judgment, on the ground of the statute of frauds and the defect of W.'s title ; it was shown that W. was wholly divested of title between the date of the lease and the filing of the bill, but that his title was perfect at the time the bill was filed ; no fraud was proved against W. ; and the vice-chancellor dismissed the bill : *Held*, that J. showed no equitable grounds of relief, and his bill was therefore properly dismissed.

ON appeal from the vice-chancery court at Carrollton ; Hon. Henry Dickinson, vice-chancellor.

On the 18th day of April, 1844, Allen Jenkins filed his bill in the vice-chancery court, at Carrollton, against William W. Whitehead, charging that William W. Whitehead, as president of the board of trustees of the 16th section of school lands, of township 18, of range 5 east, leased to his brother, Edmund G. Whitehead, for ninety-nine years, to commence on the 21st day of November, 1836, a certain tract of land for the sum of \$1403 20, to be paid in four equal annual instalments ; that Edmund G. Whitehead assigned his interest in the lease to his brother William, who gave his own notes to the commissioners, for the consideration of the lease, and to whom they were to make a deed of lease when the notes were paid ; that some time afterwards, William W. Whitehead sold to complainant, by a parol contract, the unexpired term in the lease, for which complainant was to give his three notes for the same amounts, and due at the same time of the three last notes given by Wil-

William W. Whitehead to the commissioners, and Whitehead was to make him a deed of lease as soon as the commissioners should make a deed to Whitehead; that on the 26th day of June, 1838, he paid to Whitehead, as part of the purchase-money for the lease, the sum of three hundred and fifty-two dollars, for which Whitehead gave him a receipt, and expressed in the receipt, at length, the terms of the contract with complainant, which receipt was made exhibit A to the bill; and that the amount so paid by complainant discharged the first note given by Whitehead to the commissioners. The bill further charged, that soon after the payment was made, complainant made inquiry as to the mode in which the sale had been conducted by the board of trustees, and he became satisfied that their whole proceedings were null and void; that he therefore refused to give Whitehead his three notes, as above specified, and immediately abandoned the premises, and removed to the state of Louisiana; that as soon as he refused to give his notes, Whitehead instituted suit in the circuit court of Carroll county, on their parol contract, and recovered judgment thereon against him, for the sum of sixteen hundred and eighty dollars and twenty cents, on the 15th day of October, 1841; from which judgment complainant prosecuted a writ of error to the high court of errors and appeals, which court affirmed the judgment of the circuit court. The bill further charged, that in May, 1842, upon the petition of a majority of the citizens of the township, which petition William W. Whitehead was active in getting up, and procuring signatures to, the probate judge of the county, in pursuance of an act of the legislature of the state of Mississippi, passed on the 24th day of February, 1842, rescinded the sale made by William W. Whitehead, president, &c. as aforesaid; and the notes given by Whitehead to the commissioners, as above-mentioned, were thereupon returned and given up to him; Whitehead and he then surrendered his lease, which petition was made exhibit B to the bill; that after the notes and lease were surrendered up, the land was again leased, by an order of the probate judge of the county, for the term of ninety-nine years, to commence on the

Jenkins v. Whitehead.

1st day of December, 1842, to Allen Gary and C. F. Hemingway, for the sum of one hundred and seventy-five dollars, who were then entitled to enter upon and enjoy possession of the same; that Whitehead was active in procuring a rescission of the sale made by him, as president, &c. that he might be able again to purchase in the land for a small price, and endeavor to reap some benefit from the fraud he practised upon complainant in making an assignment of his lease; that Whitehead was then endeavoring to collect his judgment, had ordered an execution thereon, and would proceed to levy and collect the same, unless enjoined, &c. The bill prayed that the contract between complainant and Whitehead be rescinded, and the lease annulled; that Whitehead be compelled to refund the money paid to him by complainant, with interest, and that he be perpetually enjoined from the collection of said judgment. The answer of Whitehead admitted, that on the 26th day of November, 1836, he was acting as the president of the board of trustees of school land, as stated in the bill of complainant; that intending to act in accordance with law, he leased out the same for ninety-nine years to his brother, Edmund G. Whitehead, and he with the other trustees executed and delivered a bond to his brother Edmund, conditioned to make a deed of lease to the land when the purchase-money was paid; that he procured from his brother Edmund a transfer of the bond, and on the 26th day of June, 1838, he sold to complainant at his, complainant's request, the unexpired term in the lease, at which time complainant paid him three hundred and fifty-two dollars, and promised to give his three notes for the residue of the purchase-money, payable at the same time his own notes fell due; that he gave complainant a receipt for the money so paid, and stated fully therein the terms of their contract, which was the same filed as an exhibit to the bill; that complainant did not execute his notes at the time of their contract, because the only paper they then had was used in writing the receipt above-mentioned; that at the time of the contract he informed complainant fully of the character of his title; he then placed complainant in possession of the land, and he used and occupied it with-

out molestation or disturbance by anybody. He denied that the original sale made by himself, as president of the board of trustees, was void, and if any irregularities existed in it, he denied that complainant could call them in question in that collateral manner; he stated that he was in good faith fulfilling his contract, and he never heard from complainant of any dissatisfaction or failure of title until shortly before the complainant left this state for Louisiana, when he called on complainant for his notes, according to their contract, and complainant refused to give them, on account of some alleged irregularity in the original sale; that he then caused suit to be instituted against the complainant, in the circuit court of Carroll county, which was defended by able counsel, who set up the alleged failure of title, relied upon the statute of frauds, and made every defence that could have been made, and upon a full and fair trial, he recovered judgment against the complainant for \$1680 20, which judgment he admitted was affirmed by the high court of errors and appeals. Respondent admitted, that in May, 1842, a majority of the citizens of the township petitioned for and procured from the probate judge of the county, an order rescinding the original sale; but he denied that he was active in getting up the petition, and obtaining signatures thereto; he admitted he had no objection to the order, but denied that he either signed the petition himself, or requested anybody else to sign it; and he submitted whether such order of the probate judge was regular. He admitted that another sale was ordered, and Allen Gary and Collins F. Hemingway became the lessees of the land, though he stated that he procured from them an assignment of the lease, and a deed had been executed to him for the land, and he made the assignment and deed exhibits to his answer. Respondent denied that he ever made any misrepresentations to the complainant, or acted with any fraudulent intent, and insisted that he always acted in good faith; was then fully prepared and willing to comply with his contract with the complainant, and execute a good and valid lease to the land, and he asked leave to rely upon his answer as a demurrer to the bill. The parties

then entered into the following agreement, to wit: "It is admitted that the land described in the bill was leased to Edmund G. Whitehead, for the term of ninety-nine years from the 21st November, 1836, for the price stated in the bill; that E. G. Whitehead assigned his interest for the term of years in said land to his brother, the defendant; that about June, 26, 1838, W. W. Whitehead assigned his interest for the unexpired term set forth in complainant's exhibit A, to Allen Jenkins, complainant; that under that assignment Jenkins went into possession, and used and occupied about twenty acres of the land for one year or more; that some time in 1840, Jenkins refused to perform the contract in exhibit A, and abandoned the possession of the land, and removed to Louisiana, where he has since resided. Just before the departure of Jenkins, Whitehead instituted his action of assumpsit on the exhibit A, in the Carroll circuit court; Jenkins in his defence insisted on the statute of frauds and defect of title; that judgment was rendered in favor of Whitehead on the 15th October, 1841, for \$1680 20, as stated in the bill, from which judgment Jenkins prosecuted his appeal, and on hearing thereof, said judgment was affirmed; that in May, 1842, a majority of the citizens of the township named in exhibit B, presented a petition, (of which said exhibit is a copy,) and in pursuance of said petition, the sale of said 16th section was rescinded by the probate judge of Carroll county, under the act of the legislature approved February 24th, 1842; that the probate judge gave up to W. W. Whitehead the notes which he had given for the lease, and he surrendered the bond which was assigned him for a deed of lease; that after the contract had been thus rescinded, the probate judge, in pursuance of the statute of February 24th, 1842, ordered a sale of the land named in the bill, and on the 15th day of December, 1842, he leased the same for the term of ninety-nine years to Allen Gary and C. F. Hemingway, for one hundred and seventy-five dollars; that W. W. Whitehead, on the 30th October, 1843, purchased of Gary and Hemingway the term aforesaid, as set forth in the answer of defendant; and the probate judge, on the 4th day of June, 1844, made a deed of lease for said term to

W. W. Whitehead, all of which shall be regarded as proof, and the cause set for hearing June 13th, 1844." The cause was submitted to the vice-chancellor on the bill, answer, exhibits, and the foregoing agreed state of facts, and on the 19th day of June, 1845, he rendered a final decree, dismissing the bill, from which the complainant appealed to this court.

Sheppard, for appellant.

Two points are presented by the record in this cause, which I think will warrant a reversal of the decree entered in the vice-chancery court.

1. That the rescission of the contract, under the act of 1842, did by the provisions and requirements of that law, defeat and rescind the assignment of the lease made to Jenkins.

2. On general principles, independent of the particular provisions of the law of 1842, such surrender will entitle the assignee to the relief sought by his bill.

The act of 1842 provides, that such rescission shall not be made or allowed unless all subsequent assignments are thereby surrendered up. Acts of 1842, p. 131, sec. 1. It would be against the positive enactment and policy of the law to allow the assignor to compel a performance of such contract.

Whitehead surrendered the old lease, and has since accepted a new lease, which would in law amount to a surrender and abandonment of the first lease. *Livingston v. Polls*, 16 Johns. R. 28. The surrender of the lease, after Jenkins had disclaimed all interest, precludes the defendant from insisting on the contract of assignment. It would in law be an eviction under that title.

The position taken on the part of defendant, that he can now make an assignment, will not avail him in bar of the relief sought. This position would be more plausible if the contract had been to make an assignment at a future day. The contract was made for an assignment of an existing estate, a subsisting term.

In contracts in reference to a leasehold interest, words in *presenti*, which pass a present interest, will be construed as passing

Jenkins v. Whitehead.

the legal title, and giving the assignee or lessee a present right of entry. And the covenant for title will be construed as a covenant for a more formal assurance. 4 Cruise Dig. 59, cases cited in note.

In the case at bar this question is placed beyond doubt, by the agreed facts, which admit that the *contract* was for an *assignment* of the *term*, accompanied with possession; Jenkins was only taking the place of Whitehead, in the contract made with the trustees.

To allow the defendant to have execution, and coerce payment of the judgment, because he can make a new assignment of the second lease, would in effect change the agreement on which the judgment was recovered, and substituting a new consideration for which Jenkins had never contracted. The facts in which the equity of case arises here, occurred subsequent to the rendition of the judgment.

The petition by the citizens of the township, seeking to have the sale rescinded, shows that there were great doubts, as to the validity of the sale, by the trustees. Such doubt caused the complainant to abandon the contract; and in this view the very great depreciation of the property in value, is material to be considered.

The first lease, was purchased for about sixteen hundred dollars, and the last for one hundred and seventy-five.

William G. Thompson, for appellee.

Whitehead obtained his judgment for the purchase-money, not on the ground that he had title to the land, when he sold, but on the ground of his agreement to make title, and putting Jenkins in possession. Jenkins does not show here, nor did he show on the trial at law, that Whitehead could not make title. He could not abandon the land, and rescind the contract, without an offer to pay the purchase-money and a demand of title. Whitehead was entitled to judgment for the purchase-money, on the ground of his agreement to make title, not because he then had title under the school commissioner. He was entitled to judgment, although he then had not title under the commis-

sioner. His contract with Jenkins was wholly independent of, and distinct from, his contract with E. G. Whitehead for title from the commissioner. How then could he lose his right in the judgment by releasing and giving up a color of title, held under the commissioner's sale? He was still bound by his agreement to make title. And on the ground of that liability, he was entitled to the judgment for the purchase-money, at the time he obtained it. Jenkins can only go in equity for a rescission of the contract, on the grounds that Whitehead will not be able to make him a title, and that he is insolvent, and that therefore, his right of action on Whitehead's agreement will not avail him anything. But there is no proof that Whitehead is insolvent, and it is not pretended that he cannot now make title. It is clearly manifest, from Whitehead's answer, and the agreed facts, that Whitehead has perfected his title. How then can it be pretended, that he has practised a fraud on Jenkins? There is no proof whatever that he made any misrepresentations in regard to his title.

William Thompson, on the same side.

Mr. Justice THACHER delivered the opinion of the court.

Allen Jenkins filed his bill of complaint in the vice-chancery court for the northern district, to set aside a contract of lease of land made by him with William W. Whitehead, to recover back an amount of money paid on said contract and to perpetually enjoin a judgment at law recovered against him in an action founded upon said contract. The facts were as follows: William W. Whitehead, as President of the Board of Trustees of the 16th section of school lands, leased certain lands to his brother, Edmund, for the term of ninety-nine years from the 21st day of November, 1836; Edmund assigned his interest in said lands to William, and about the 26th day of June, 1838, William assigned to Jenkins. Under this assignment Jenkins went into possession of the lands; but some time in 1840 he refused to perform his portion of the contract and abandoned the possession of the land. William sued Jenkins at law upon

Jenkins v. Whitehead.

his contract to pay the consideration for the assignment, and recovered. In this suit at law Jenkins set up, as defences, the statute of frauds and a defect of title. In May, 1842, upon a petition of citizens, the lease of the 16th section aforesaid was rescinded by the probate court of Carroll county, and William surrendered his bond which was assigned him for the deed of lease. After this rescission, the probate judge ordered a sale of the lands aforesaid, and they were purchased by Gary and Hemingway, at a price much less than the amount of the first lease by the President of the Trustees of school lands, and William Whitehead became the purchaser from Gary and Hemingway.

The only equitable ground upon which Jenkins can claim a rescission of the contract is that Whitehead cannot make a perfect title. This is not pretended. Although a period might have existed when Whitehead was divested of title, between the date of his contract with Jenkins and the filing of this bill, yet as he has since perfected his title, and was in that attitude at the time of the filing of this bill, the ground of complaint of Jenkins is unfounded. It does not appear that any specified time entered into the contract at which Whitehead should make title to Jenkins. The essence of the contract was, that Whitehead should make Jenkins a perfect title to the lands. There is no pretence that fraud or misrepresentations were practised by Whitehead, and all the circumstances surrounding Whitehead's original title were known to Jenkins.

Decree affirmed.

BENJAMIN D. ANDERSON vs. EBENEZER MILLER AND CHARLES ANDERSON.

The transfer of an attorney's receipt for a claim in his hands for collection, vests in the assignee an equitable right to the proceeds of the claim.

Where an instrument not assignable is sued on, in the name of one for the use of another, the nominal plaintiff cannot discharge or release the action; courts of law will protect the equitable right of the assignee, by compelling the nominal plaintiff to permit his name to be used for the recovery of the claim. All the nominal plaintiff can require is indemnity against costs.

A purchaser at a sale, made by an assignee in bankruptcy, of the bankrupt's effects, acquires only such title as the bankrupt had at the time of his discharge. Where, therefore, a bankrupt, before he filed his petition in bankruptcy, assigned a claim due to him, which was then in the hands of his attorney for collection, and the debtor was duly notified of the transfer; and the claim was, notwithstanding the transfer, included in the schedule of the bankrupt, and sold by his assignee in bankruptcy, and afterwards paid by the debtor to the purchaser at the assignee's sale: Held, that it was improper in the debtor to pay the purchaser at the assignee's sale, and the payment was no discharge of the debt.

ERROR from the circuit court of Pontotoc county; Hon. Nathaniel S. Price, judge.

The record in this case discloses the following facts, to wit: That on the 16th day of September, 1844, Benjamin D. Anderson filed in the office of the clerk of the circuit court of Pontotoc county a petition, stating that on the 17th day of November, 1841, one Ebenezer Miller recovered a judgment against him in the circuit court of that county for \$218 18 damages, besides costs; that an execution was issued on that judgment, levied and bonded, and the bond forfeited, and another execution issued on the forfeited bond, which was then in the hands of the sheriff of Pontotoc county; that on the 1st day of July, 1842, Miller was declared a bankrupt, rendered a schedule of his as-

sets, including' the judgment against the petitioner, and on the 24th day of October, 1842, he was finally discharged from all his debts under the general bankrupt act of the United States; that John C. Carter was appointed assignee of the assets of Miller, and by virtue of such appointment assumed full control over the judgment and execution against the petitioner, and on the first day of April, 1844, sold and transferred the same to William H. Mosely, and gave him a certificate thereof; that on the 29th day of August, 1844, petitioner obtained from Mosely a full acquittance and discharge of and from the judgment and execution, which was made exhibit A to the petition; and on the 30th day of August, 1844, he paid to the sheriff the costs in full due on the execution; that petitioner exhibits to the sheriff the certificate of purchase obtained by Mosely from Carter, the assignee of Miller, and the receipt from Mosely to him, and required the sheriff to return the execution satisfied, which the sheriff wholly refused to do, and was then proceeding to collect the money. The petitioner prayed for a supersedeas, and that the execution should be entered satisfied at the return term of the circuit court. Upon this petition a writ of supersedeas was granted by the Hon. James M. Howrey. At the return term leave was given to Charles Anderson to interplead, and he filed an answer to the petition, stating that on the 10th day of December, 1839, Ebenezer Miller, being indebted to him, gave him an order on H. R. Miller, the attorney of Ebenezer Miller, who then held for collection the claim against Benjamin D. Anderson, referred to in the petition, requiring H. R. Miller to pay him out of the proceeds of that claim, when collected, the sum of one hundred dollars, which order was accepted by H. R. Miller on the 21st day of January, 1840, payable when the money was collected. And he received the order of Ebenezer Miller in part payment of the sum due by Miller to him, and he made the order an exhibit to the answer; that afterwards Ebenezer Miller became further indebted to him, and for the purpose of securing such further indebtedness, together with the hundred dollars for which the above-mentioned order was given, Ebenezer Miller, on the 16th day of February, 1840,

transferred to him the receipt of H. R. Miller for the claim against Benjamin D. Anderson, on which the judgment referred to in the petition was recorded, and he filed the receipt as an exhibit to the answer; that he, soon after the transfer, informed the attorney of the fact, and that he also informed Benjamin D. Anderson that the receipt had been transferred to him, and he was entitled to receive the proceeds of the claim, long before the alleged bankruptcy of Ebenezer Miller, and that Benjamin D. Anderson promised to pay him the amount, but failed to do so, and thus two or three terms of the court were permitted to pass before suit was instituted. He further stated that the whole amount due from Ebenezer Miller to him was unpaid, and if anything was collected of Benjamin D. Anderson over and above the amount due him; that he would assert no claim to the excess; he insisted that he was the owner of the claim against Benjamin D. Anderson before Ebenezer Miller filed his petition in bankruptcy, and that he was still entitled to his execution against Anderson. On the 18th day of September, 1845, the case was tried before a jury, who returned a verdict against the supersedeas, upon which the court entered judgment dismissing the supersedeas. The petitioner then moved the court to set aside the verdict of the jury because it was contrary to law and evidence, which motion was overruled by the court, and the petitioner filed a bill of exception, from which it appears that on the trial before the jury, the counsel of Charles Anderson, after admitting all the statements contained in the petition, read to the jury the order and receipt filed as exhibits to the answer of Charles Anderson, and then introduced H. R. Miller, who testified that very soon after he accepted the order for one hundred dollars in favor of Charles Anderson, he informed Benjamin D. Anderson that the order had been drawn by Ebenezer Miller on and accepted by him; that some time thereafter, he believed about the 16th day of February, 1840, Charles Anderson informed him that Ebenezer Miller had transferred to him, Anderson, and he was then the holder of witness's receipt given for the claim against Benjamin D. Anderson, when it was left with him for collection, and that he, witness, mentioned the fact

to Benjamin D. Anderson, the first time he met him after that time, all of which occurred long before Ebenezer Miller was declared a bankrupt. Henry Duke also proved that he informed Benjamin D. Anderson that Ebenezer Miller had transferred to Charles Anderson, H. R. Miller's receipt for the claim against him, and that Benjamin D. Anderson said he did not know Charles Anderson in the transaction. Which was all the evidence offered on either side.

Benjamin D. Anderson now prosecutes this writ of error.

D. C. Glenn, for plaintiff in error.

The first point presented by the record is this: Under the rules of law as applied to the transactions of bankrupts, would this transfer be valid? Upon the eve of bankruptcy Miller assigns to a creditor a valuable portion of his assets. This was in direct opposition to the meaning and spirit of the bankrupt law.

2. The defendant in error has no peculiar claims on the court; he voluntarily placed himself in the position he occupies; he has paid out no money; he has only attempted to strengthen his claim and took a collateral for a preëxisting debt. He has lost nothing and is in the same position he was in before he took this security, for he has not receipted or entered satisfaction upon his antecedent judgment.

3. We have come fairly into possession of our rights; not by collusion with Miller, but by a fair and *bona fide* purchase. It is not alleged that the purchaser at the assignee's sale ever had any notice of any outstanding equity existing against this judgment. We are invested with all his rights and clothed with all his privileges. A purchaser from him without notice, we can and do claim the rights of a purchaser for valuable consideration without notice also.

4. Charles Anderson claims as assignee of this judgment to enforce it in his own name. Under the decision of this court (*Wilson v. McElroy*, 2 S. & M. 250, and cases cited,) can this be done by him in the mode adopted in this case?

Mr. Justice CLAYTON delivered the opinion of the court.

Upon the facts contained in the record, this judgment must be affirmed.

By the transfer of the attorney's receipt to him, Charles Anderson became in equity entitled to the proceeds of the judgment. The notice of the transfer, made it improper in B. D. Anderson, the defendant in the judgment, to pay to any one else but C. Anderson or his order. This transfer took place in February, 1840, nearly two years before the bankruptcy of Miller, and more than twelve months before the passage of the bankrupt act, which was in August, 1841. After this transfer Miller was but a mere naked trustee, having no right to the judgment in himself. It ought not to have been embraced in his schedule, rendered to the court of bankruptcy. It does not appear that Charles Anderson was a party to the proceedings in bankruptcy, and unless he were, his interest could not be affected by them. It is not shown that he was then a creditor of Miller. The assignee in bankruptcy took precisely the place of Miller, and was in no better condition in regard to his effects. The purchaser at the sale of the assignee occupied the same position. Now as between Miller and Charles Anderson, after the transfer, and before the bankruptcy, it is not possible to doubt the preference of Anderson to the proceeds of the judgment; it cannot be different as to the assignee of Miller.

The transfer of the attorney's receipt, vested an equitable right to the proceeds of the judgment, in Charles Anderson. *Fitch v. Stamps*, 6 How. 487; *Roberts v. Bean*, 5 S. & M. 590. Can this right be enforced in the court of law? When an instrument not assignable is sued on, in the name of one for the use of another, the nominal plaintiff, cannot discharge or release the action. The courts of law will protect the equitable right to this extent, and will compel the nominal plaintiff to permit his name to be used for the recovery of the claim. All he can require is indemnity against costs. *Welch v. Mandeville*, 1 Wheat. R. 236, note. There is nothing in the case cited, of *Wilson v. McElroy*, 2 S. & M. 241, that conflicts with this.

This principle protects Charles Anderson, and gives him right

to the use of Miller's name, or that of his assignee, to coerce payment of the judgment. The payment to Mosely was, under the circumstances, no discharge.

Judgment affirmed.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE AGRICULTURAL
BANK OF MISSISSIPPI vs. THE COMMERCIAL BANK OF MANCHES-
TER.

A bank which receives a note for collection, and places it in the hands of a notary in time for demand and protest, is not liable for any loss on account of the negligence of the notary.

A bank, in undertaking the collection of a note, becomes the agent of the owner, and is bound to use only reasonable skill and ordinary diligence. And when the note is placed in the hands of a notary for demand and protest, the notary becomes a sub-agent, for whose negligence the agent is not responsible, if he has used reasonable diligence in his choice as to the skill and ability of the sub-agent.

In an action against a bank, for negligence in making such demand and protest of a note, left with the bank for collection, as was necessary to fix the liability of the indorsers, the bank, by showing the delivery of the note to a notary public for demand and protest, in due time, is *prima facie* exonerated from liability; and to rebut such *prima facie* case, it is not sufficient for the plaintiff to prove in general terms that the notary was a man of dissipated habits; he must establish the negligence more definitely by proof that the notary was drunk at the time the note was given to him, or that his habits were so universally intemperate as to disqualify him for the discharge of an official act.

ERROR from the circuit court of Yazoo county; Hon. Morgan L. Fitch, judge.

This was an action brought by the President, Directors and Company of the Agricultural Bank of Mississippi, against the Commercial Bank of Manchester, to recover the amount of a note for eight thousand dollars, deposited by the former with the latter for collection. The declaration averred, that in a suit, instituted by the plaintiffs against the indorsers, a recovery was defeated, and the indorsers released and discharged on account of the negligence of the Commercial Bank of Manchester, and her failure to make a legal demand of payment of the

note, and that in consequence of such negligence and failure, she was liable to the plaintiffs for the amount of the note, with interest.

The defendant pleaded the general issue. After a verdict and judgment were rendered in favor of the defendant, the plaintiffs moved for a new trial; their motion was overruled, and they filed a bill of exceptions, setting out the whole evidence; which was substantially as follows, to wit: 'The plaintiffs read to the jury the note for eight thousand dollars, deposited by them with the defendant for collection; it was then admitted that the defendant handed the note, upon its maturity, to George E. Markham, a justice of the peace, and *ex officio* notary public, for protest; that Markham, the day the note was delivered to him for protest, went to the office of the Planters Bank in Manchester, where the note was payable, between the hours of eleven and twelve o'clock, A. M., and then and there demanded payment thereof of the teller of the Planters Bank, and payment being refused, he immediately thereafter left the bank, taking the note with him, and returned the same to the banking-house of the defendant; that he did not return on that day to the Planters Bank with the note, but waited until the expiration of the business hours of the Planters Bank, and then protested the note; that the business hours of the Planters Bank were then from ten o'clock, A. M. till two o'clock, P. M.; and it was also admitted that the plaintiffs had sued the makers and indorsers of the note, and judgment was rendered in favor of the indorsers in consequence of the demand of payment being made as above stated.

The plaintiffs then introduced S. S. Griffin, who being sworn, testified that at the time when the demand of payment of the note was made, Markham was a man of very dissipated habits, and was frequently drunk; that he would not have entrusted a similar duty to him except when he was sober. Nathaniel G. Nye, another witness for the plaintiffs, stated that Markham was a man of intemperate habits, although when sober a very competent officer; that if Markham had been sober at the time, he would have confided the note to him without hesitation, but if

he had been drinking he would have hesitated about giving it to him, unless he could have superintended personally his action in the matter. Here the plaintiffs rested their case.

The defendant then introduced J. J. Hughes, who testified that he frequently handed out notes at the counter of the defendant to Markham to make demand, &c. ; and upon all occasions Markham appeared to him to be sober. But he was not always present to hand out notes, and they were often handed out by the teller of the bank. It was also proven that there was a mayor resident in Manchester at the time the demand of payment was made, of strictly temperate habits; but Markham, when sober, was the more competent officer of the two. That at that time it was the general custom of notaries in this state to make demand of notes in the same manner the demand was made in this case by Markham; and the legality of such procedure was not at that time doubted.

This being all the evidence offered on either side, the plaintiffs' counsel asked the court to instruct the jury, "1. That if they believed, from the evidence, that the defendant did not retain the note in bank until the last hour of doing business in the bank, according to the usage of the same when the note became due, and which by law the defendant was bound to do, but before the closing hour of the bank on the day the note became due, gave it to Markham, her notary, to protest, the defendant has not discharged her duty as a collecting agent, and that the law is for the plaintiffs, and the jury will so find.

"2. That if they believe, from the evidence, that the bank, the defendant, employed Markham, a notary public, to protest the note, and he did so in such a manner as to produce a loss to the plaintiffs, the defendant is liable for that loss, and the jury will find for the plaintiffs.

"3. That if they believe, from the evidence, that Markham, by his act as agent for defendant, in protesting said note, injured the plaintiffs, though he did so through a mistaken notion of the law governing his conduct as notary, the defendant is liable for his misconduct, and they will find for the plaintiffs.

"4. That if they believe, from the evidence, that George E.

Markham was employed by the defendant as her notary to protest said note, the amount of which was lost by his misconduct, he acted as the servant and agent of defendant, and the defendant is bound for any loss which has accrued by his misconduct, and they will find for the plaintiffs.

"5. That if they believe, from the evidence, that Markham, the notary, was not a competent and faithful person at the time when the note was handed to him for protest, by reason of his intemperate habits, that the defendant is bound for the act of said Markham, and the law is for the plaintiffs."

The court refused to give either the first, second, third or fourth instruction; but gave the fifth, as asked. The defendant's counsel then asked the court to instruct the jury, "That if they were of opinion that Markham, the person who protested the note, was, in so doing, exercising the functions of a public notary by virtue of his office of justice of the peace, then the defendant is not liable for his failure to perform his duty in the demand of payment and protest of the note; but the plaintiffs must look to Markham." Which instruction was given by the court, with the qualifications contained in the fifth instruction asked by the counsel of the plaintiffs. To the opinion of the court, refusing to give four of the instructions asked by the counsel for the plaintiffs, and granting the instruction asked by the counsel for the defendant, the counsel for the plaintiffs excepted. And the plaintiffs now prosecute this writ of error.

Eustis, for plaintiffs in error.

In my endeavors to show that the defendants in this case ought not to be discharged from liability, it is not my purpose to question any decision which has been heretofore made by this court.

In *The Commercial and Railroad Bank v. Hamer*, 7 How. 451, it was the opinion of the court that the demand in the record was good; that there was no default in the case.

In *Tiernan v. Commercial Bank of Natchez*, 7 How. 657, the court decide that the bank is discharged if, when the note is not paid, they place it in the hands of a notary to protest, and give the requisite notices.

In this last case nothing will be found to support the proposition, that the official commission renders competent those who are irresponsible in law for all acts; for instance, the insane, or that larger class, to which the person employed in this case, belongs — who have only visitations of reason — who are so “frequently drunk,” and in need of the superintending care of others, that an interval of sobriety is the exception to the rule of their lives.

The suit against the indorsers failed for want of a legal demand upon the maker. It was the duty of the defendants to make or cause to be made such demand. How have they discharged that duty? They say they gave it to a notary; on what day does not appear. The phrase in the bill of exceptions is, “upon the maturity of the note;” which may mean, upon one or other of the three days of grace. It does not mean “at the close of banking hours on the third day of grace,” because it is subsequently stated that at that point of time, it was in the banking-house of the defendants. This subsequent statement is, that the notary, “on the day on which said note was so handed to him for protest, went to the office of the Planters Bank, between the hours of eleven and twelve o’clock, and then and there, &c. and immediately thereafter left said bank, taking the note with him, and returned the same to the banking-house of the defendants; and after business hours protested it.”

Now it appears that the bank at which the note was payable, closed at two o’clock. According to the law, as now settled, that was the hour for presentation. At that time the note was lying upon the counter of the defendants. It is barely possible that the notary was doing likewise, that being the only presumption which will support the idea of its continuing in his possession, but a stronger presumption is, that he was refreshing his competency elsewhere, and that the note remained in the possession, and under the control of the defendants.

Then it appears that, from the return of the notary at twelve o’clock, until two o’clock, the hour of closing, the defendants held the note in their possession. The place of payment was

in the same small town, in which is their banking-house. Any one of their clerks was competent to make the demand; yet they neglected to send any one for that purpose. Now, when we say to them, "this was negligence, by which we are liable to lose a large sum of money, and the loss ought to fall upon you," what is the reply? Not, that they were mistaken in the law — but, making us acquainted with their "eleven o'clock" friend, they assure us that he was actually then and there a commissioned notary, public, and that they rely with perfect confidence for their discharge, upon the fact, that he once, "upon the maturity of the note," had it in his possession. As to any demand by him, whether on the proper day, or six months previously, they agree with us, that it was premature, insufficient, and unprofitable.

That they gave it to a notary to protest, before it was due, is the full extent of the case made for the defence in an action, the gravamen of which is, the neglecting to make a demand. If, after these several futile performances on their own part and on the part of the notary, the note is shown to have come again into their custody and under their control, before the time of presentation for payment, and they, having that control, neglected to make the demand, the charge is proved as laid in the declaration, and the plaintiffs were entitled to a verdict.

What if such premature demand was customary amongst notaries in this state? If the fact be so, it was of no avail for the plaintiffs in the action against the indorsers on the note. It is equally foreign to the purpose, when set up by the defendants in this case. In both suits, there was a contract that there should be legal demand.

If, however, the court should doubt whether returning with the note to the banking-house of the defendants, was returning it to their custody and control, then the competency of the notary becomes material; and the evidence clearly shows that the notary employed by the defendant was not a suitable or competent person to perform the important and responsible duty confided to him.

William R. Miles, for defendant in error.

From the bill of exceptions it appears that several instructions were asked of the court below by the plaintiff in error, all of which were refused but the last; and that the only instruction asked by the defendant in error was given.

An examination of the case of *Tiernan et al. v. The Commercial Bank of Natchez*, 7 How. R. 649, will at once manifest the propriety and entire accuracy of the judgment pronounced by the court below. With the law thus settled, I deem it a work of supererogation to attempt an addition to the reasoning of the court contained in the opinion above referred to.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

It seems that the Agricultural Bank was the holder of a promissory note made payable at the Planters Bank at Manchester, and transmitted it to the Commercial Bank of Manchester for collection. At its maturity the note was delivered by some of the officers of the Commercial Bank to a notary for demand and protest. He went to the Planters Bank on the last day of grace; and made demand between the hours of eleven and twelve o'clock, and on being refused payment, took the note away with him, and returned it to the Commercial Bank, and protested it for non-payment after the close of banking hours. The bank closed at two o'clock P. M., until which time debtors had a right to pay their notes. In consequence of this premature demand the indorsers were discharged, the holder of the note having failed on that ground in a suit against them. This suit is brought against the Commercial Bank to recover the amount of the note in consequence of alleged negligence in having the demand made. .

In the case of *Tiernan v. The Commercial Bank of Natchez*, it was settled that a bank which receives a note for collection, and places it in the hands of a notary in time for demand and protest, is not liable for the neglect of the notary. That in undertaking to collect for others, a bank becomes an agent, and is bound to use only reasonable skill and ordinary diligence. That the notary selected by the bank becomes a sub-agent, for whose

negligence the agent is not responsible, if he has used reasonable diligence in his choice as to the skill and ability of the sub-agent. 7 How. 648. The present case is admitted to be like the one cited except in one particular, and that it is said is of such a character as to entitle the plaintiff to recover. The notary to whom the note was delivered, was a man of very dissipated habits. One witness stated that the notary, at the time the demand was made, was a man of very dissipated habits, and frequently drunk; the witness would not have trusted him to discharge such a duty except when sober. Another witness also stated that the notary was a man of intemperate habits, but a very competent officer when sober. He would have trusted him without hesitation to discharge such a duty when sober, but if the notary had been drinking, he would have hesitated about giving him the note unless he could himself have superintended his action. J. J. Hughes stated that he had frequently handed out notes at the counter of defendant to the same notary to demand and protest, and upon all such occasions the notary seemed to be sober, but the witness was not always present at the banking house to hand out notes; they were sometimes given out by the teller. It was also in proof that there was at the time this protest was made, a mayor of Yazoo city, the town in which these banks were situated, who was a temperate, steady man, but that the notary was best qualified for such duties when sober; and it was further in proof, that at the time when this protest was made, it was the general custom of notaries in this state to make demand as it was made by this notary. The question is, does this testimony vary the case from the precedent cited, and establish such negligence as to make the Commercial Bank liable?

The witnesses spoke of the notary's general habits; there was no proof as to his condition when the note was delivered. Let it be admitted that the plaintiff made out a *prima facie* case by showing that this note was received by the defendant for collection, and that the indorsers were discharged and the debt lost for want of proper demand. It was then incumbent on the defendant to furnish an excuse. This it did *prima facie*,

according to the principle of the case cited, by showing the delivery of the note to a notary in due time for a demand. Supposing the proof to have been introduced in this order, then the defendant stood exonerated. To rebut this *prima facie* excuse, the plaintiff introduces proof in general terms of the bad habits of the notary; but does it necessarily follow that the loss was a consequence of these bad habits? Not at all; for the notary may have been sober at the time, and the witnesses say he was competent when sober. Such proof then did not necessarily remove or rebut the defence; it was necessary that the plaintiff should have established the negligence more definitely by proof that the notary was drunk at the time, or that his habits were so universally intemperate as to disqualify him for the discharge of an official act. The court did instruct the jury that if the notary was not a competent and faithful person by reason of his intemperate habits when the note was delivered to him, then the defendant was liable; and we do not think that the court could have given the other charges asked according to law. The question of the notary's drunkenness at the time he received the note, was one of fact for the jury, and the charge of the court was such as to bring it to their notice. It seems, moreover, that the defendant was in the habit of employing this same notary in its own business, for so we must understand the testimony of Hughes, and it was not required to exert greater diligence for another. *Tiernan v. Commercial Bank*, 7 How. 648. We cannot agree that the onus was changed or shifted by this general proof of intemperate habits, as it is in cases of insanity, and that it was consequently necessary, after such proof, for the defendants to show that the notary was sober when the note was delivered. When a man is proven to be *non compos mentis*, the law presumes that he continues so, and hence the reason of the rule.

Judgment affirmed.

ANDREW LEE JR. *vs.* NATHAN HOOKER.

It is well settled in courts of equity, as well as law, that a party is not entitled to relief after verdict, upon testimony, which with ordinary care and diligence he might have procured and used upon the trial at law.

L. sued H. in an action of assumpsit for medical services, and recovered a judgment; H. some time thereafter, filed a bill in chancery, praying for an injunction, and a new trial, upon the ground of evidence discovered since the trial at law, which newly discovered evidence consisted of the opinions of physicians as to the nature of the disease under which H. was suffering, without showing any good reason why those opinions were not procured before the trial at law: *Held*, that an ordinary degree of diligence would have brought to light the newly discovered evidence as well before the trial as since; and that the injunction should be dissolved, and the bill dismissed.

ERROR from the district chancery court at Carrollton; Hon. Joseph W. Chalmers, vice-chancellor.

On the 11th day of October, 1842, Nathan Hooker filed in the district chancery court of Carrollton, a bill against Andrew Lee junior, alleging, that having been long afflicted with an ulcer on one of his eyes, believed by some to be a cancer, he was induced, in the fall of 1839, to go to the defendant, who was represented as a man skilled in the use of various botanical medicines, and had discovered a specific remedy for cancer, and upon examination of the ulcer, defendant pronounced it an open cancer, and assured him unless some relief was afforded, it would soon prove fatal; that the defendant assured him if he would strictly follow the prescriptions of the defendant he would be relieved, and the disease entirely eradicated; that he thereupon agreed to follow strictly the prescriptions of the defendant, and if the defendant succeeded in removing the disease, he was to pay him four hundred dollars, and nothing if he failed; that he pursued the defendant's prescriptions strictly, and applied his medicines for forty days, and

finding the use of the medicines had aggravated instead of relieving the disease, and believing there was danger of destroying his eye by the further use of the medicines, he entirely abandoned them; that the defendant thereupon immediately instituted an action of assumpsit against him for the full amount of the four hundred dollars; and at the October term, 1840, of the circuit court of Carroll county, recovered a judgment for that sum; that upon the trial of the case he relied upon the proof that the defendant's prescriptions, during the time he followed them, had aggravated the disease, as a sufficient bar to a recovery; but the defendant proved he had succeeded in curing several cases which he had pronounced cancer, and also that complainant had been exposed to inclement weather, while applying his remedies, and that it was probably owing to such exposure the disease was aggravated. But from the facts and circumstances which had occurred and come to the complainant's knowledge since the trial, it was perfectly clear that the defendant was mistaken in the character of the disease; that in the summer of 1842, he visited Lexington, Kentucky, to submit his case to the examination of Dr. Dudley, and obtain from him medical aid, and upon an examination of the ulcer, Dr. Dudley said it was not a cancer, but originated in a diseased condition of the stomach and liver; that he also submitted his case to other medical men of Lexington, and they all concurred in opinion with Dr. Dudley; that he had since tried the remedies prescribed by Dr. Dudley, intended to act on the stomach and liver, and he was rapidly recovering; he therefore confidently charged that the disease was not a cancer, and he would be able to establish the fact as well by the opinions of medical men of the highest eminence in the United States, as from the present condition of the ulcer, the same results not having occurred which would necessarily have taken place had the disease been a cancer. The bill prayed for an injunction, and for a new trial. Upon this bill an injunction was granted by the Hon. Robert H. Buckner. The defendant answered, stating that the agreement between the complainant and himself was, that he was to cure a can-

cer that had formed about the point of complainant's cheek-bone, and the affection in his eye, for the sum of four hundred dollars, and if the cure was not effected upon complainant's strictly following his direction, then he was to receive nothing for his services; that it was also a part of the agreement, that complainant was to remain at his house while the cure was being effected; he averred that complainant, on his first visit to respondent's house, remained only six days, during which time the cancer improved so much that complainant could not be restrained from visiting his family; he denied that he told complainant the affection in his eye was a cancer; he averred that complainant remained at his house only two and a half days after he commenced operating upon his eye; and during that time he had entirely removed the inflammation and swelling from his eye; that complainant then seemed to entertain no doubt that a speedy cure would be effected; that under this belief he again left the house of respondent, contrary to his express agreement; he denied that complainant followed his prescription for forty days, and stated that he followed it only for the time he remained at respondent's house; he denied that his treatment aggravated the disease; and averred that his eye was improved, as before stated; that he could have cured complainant in a week from the time he left his house, and so assured him; that complainant left with the express understanding that he would return in a few days, though he failed to do so; he averred that he effected many cures of like diseases in the eyes of others with the same medicine and the same kind of treatment he used on complainant; that there was nothing in the applications which he made to complainant's eye that could injure it. Respondent further averred, that after the verdict and judgment at law, the complainant moved the court for a new trial at law and upon a full examination of all the facts of the case, the court overruled the motion; that complainant then filed a bill, and obtained an injunction, in the circuit court of Carroll county, at the spring term, 1841. That respondent's solicitor filed a demurrer to the bill; that the demurrer was confessed, and the bill dismissed by the

court; that after the dismissal of the bill, execution issued upon the judgment at law, and was levied on the property of the complainant, and he executed a forthcoming bond; that the bond was forfeited, and judgment entered thereon at the April term of the circuit court of Carroll county, 1842.

The deposition of Benjamin W. Dudley, taken by complainant, proved that complainant submitted to him the ulcer immediately under his eye; and in consequence of the character of the disease having been changed by the applications made to it, deponent could not certainly point out the cause and precise nature of the sore; sufficient was manifested, however, to forbid the conclusion that it was a cancer; that in the treatment of the case, any exciting application would have been injurious, and the persevering use of caustics, under the idea of its being a cancer, would certainly have destroyed the eye. On cross-examination he stated that the first time he saw the complainant was in the summer of 1842, and he did not see him again until May, 1843; that in the meantime a very great improvement in the disease had taken place; and while complainant followed faithfully the directions given him by deponent, the improvement was equal to his expectations; but by neglect of the instructions the improvement had been checked; that the disease was not cancer, but the result of a protracted derangement of the interior organs of the body. The defendant proved by T. S. Ayres that he was one of the counsel who tried the case for Lee in the circuit court, though he has had nothing to do with it since; that he regarded Joseph Williamson as the most important witness for Lee, examined on the trial in the circuit court; that Williamson proved fully the agreement made by Hooker and Lee at the time the former employed the latter to cure a case of cancer; which was, that Hooker should place himself under the treatment and care of Lee, and follow strictly his prescriptions, and if Lee succeeded in removing the disease, Hooker was to pay him four hundred dollars; and if he failed to effect a cure, Hooker was to pay him nothing; that he, Williamson, heard Lee tell Hooker at the time, if he failed or refused to follow his directions, he would demand the whole

Lee v. Hooker.

four hundred dollars; and Hooker agreed to the terms. Deponent further proved that when Williamson was examined in the circuit court, judging from his appearance, manner and voice, he was in a very languishing condition, and had since died, as deponent understood; that a judgment was rendered in the circuit court in favor of Lee, a motion made by the defendant for a new trial, and overruled by the court. Being cross-examined he stated he had heard Lee say he did not profess to be a regular bred physician; that he never underwent a course of medical studies; that his knowledge in the healing art consisted in the external application of some substance known in this country only to his mother and himself, by which he asserted he could cure cancers, white-swellings, scrofula, and diseases of that character.

Several other depositions were read on the part of the complainant, proving the contract between Lee and Hooker to be substantially as stated in the deposition of T. S. Ayres; and also that the applications made by Lee to the eye of Hooker were of a caustic and burning nature, and produced a good deal of inflammation; that Hooker remained at Lee's house several weeks, and left with the understanding that he would return; that Hooker stated he intended to return, and would have done so had not Lee claimed the four hundred dollars from him, on the ground that he had forfeited his contract; that Hooker was frequently heard to complain of the pain occasioned by the remedies of Lee; and he said he could not follow the directions given to him. Upon this state of pleading and evidence the case was submitted to the chancellor; and on the 22d day of June, 1843, he rendered a final decree, perpetuating the injunction, and awarding a new trial. To reverse which decree the defendant now prosecutes this writ of error.

Cothran and Howard, for plaintiff in error.

1. This controversy has been before adjudicated in a court of equity, and that is insisted upon as a defence to this suit.

2. But if Hooker ever could have gone into equity for relief against this judgment, he has waived it by his negligence and

by his acts since its rendition. His former bill shows that at the date of it, to wit, in January, 1841, he was acquainted with the facts upon which he now relies for relief. With this knowledge, on the 3d of February, 1842, he executed a forthcoming bond to replevy property levied on to satisfy the judgment. This bond was forfeited, and Lee had judgment upon it, before the filing of this bill. This was a clear waiver of all equities against the original judgment. There is no better settled doctrine, than that "where a party, having knowledge that a fraud has been practised upon him, does acts in confirmation of his contract, by entering into new engagements concerning it, will be held to have waived the fraud, and to have renounced the relief which he otherwise might have obtained. *Pintard v. Martin*, 1 S. & M. Ch. R. 126; *Ayers v. Mitchell*, 3 S. & M. 693, 694; *Fletcher v. Wilson*, 1 S. & M. Ch. R. 134, 340, 389; *Sadler v. Robertson*, 2 Stewart's Al. R. 520; *Roach v. Rutherford*, 4 Dessaus. 261; *Green v. Robertson*, 5 How. 104, 105. In order to have entitled him to relief against this judgment, the bill should have alleged and shown, that at the time when he made his motion for a new trial at law, at the time when he filed his first bill, and at the time when he executed the forthcoming bond, he was ignorant of the facts upon which he now relies for relief. If he were acquainted with the facts, or with due diligence might have been, at the time of either of these acts, he cannot now have relief. See the authorities before cited, and 3 J. J. Marshall, 522; 4 Bibb, 168, 348, 414. The bill contains no such allegations; but by referring to the first bill filed, it will be seen that at the time he gave the forthcoming bond, he did know all the facts upon which he now rests his equity against this judgment. He has slumbered upon his rights, and has not shown the diligence which equity requires as an indispensable prerequisite to relief.

Sheppard, for defendant in error.

Any matter which proves the execution of a judgment to be against conscience and right, of which the party was prevented by accident from availing himself at law, without laches, will warrant a court of equity to grant relief. 2 Story's Eq. 173.

Though defendant insists by his answer, that the disease was cancer, and that he effected a cure, it is fully established by the proof that the answer is false.

It is clearly deduced from the statements of the bill, and proof, that the verdict was rendered on special contract, solely on the presumption that the disease was cancer, and that Lee could have effected a cure. In this view the developments made subsequent to the judgment, have a most important bearing and show the verdict to be oppressive and unjust.

Dr. Dudley shows that the use of Lee's remedies would have caused irreparable injury, by destroying the eye.

No imputation of laches can be made against Hooker, for the discovery was made by aid of the eminent ability and scientific skill of others, in the application of certain remedies, and progress of the disease.

Courts of equity watch with great jealousy all contracts made between parties standing in confidential relations, which afford an opportunity for the exercise of undue influence.

Judgment obtained by an attorney against his client, will be inquired into after great lapse of time. 2 Atk. R. 295. The same enlarged and liberal principles are applied to the relation of medical adviser and his patient. 1 Story's Eq. 318.

The forfeiture of the forthcoming bond is no bar to relief; it is subject to all equities which attach on the original judgment. *Hoyet v. Couch*, 5 How. R. 194.

Mr. Justice CLAYTON delivered the opinion of the court.

This bill was filed to obtain a new trial at law, after a verdict and judgment in favor of the plaintiff at law, and after forthcoming bond given and forfeited. The bill was filed about two years after the judgment. The rule upon this subject, is thus stated by Chancellor Kent in *Floyd v. Jayne*, 6 Johns. Ch. Rep. 482. "It is the settled doctrine and practice of this court, as well as of courts of law, that a party is not entitled to relief after verdict, upon testimony, which with ordinary care and diligence, he might have procured and used upon the trial at law. It would be establishing a grievous precedent, and one of

Lee v. Hooker.

great public inconvenience, to interfere in any other case than one of indispensable necessity, and wholly free from any kind of negligence." See also *Land v. Elliott*, 1 S. & M. 611. There is no allegation of fraud used in obtaining the judgment.

The facts relied on to procure a new trial, it is true, have been discovered since the trial at law. But an ordinary degree of diligence would have brought them to light, before the trial, quite as well as since. They are the opinions of physicians as to the nature of the disease, under which complainant was suffering; and no reason is shown why they were not consulted at an earlier period.

The decree of the vice-chancery court, granting a perpetual injunction to the judgment at law, and awarding a new trial, is against the principle above laid down. It is therefore reversed and the bill dismissed.

Decree reversed.

**JAMES J. PEARSON, ELMER & BRISCOE, AND THE BANK OF PORT
GIBSON, vs. LEWIS F. MORELAND AND EMILY J. MORELAND,
Administrator and Administratrix of Josiah Willis, deceased.**

The creditors of an estate, have the first claim upon the property in the hands of the administrator, and it is his paramount duty to protect their interest by using every effort to make the property under his charge sell for the best price that can be had for it.

An administrator cannot purchase at his own sale, either directly or indirectly, nor can he sell under a secret trust or private understanding, that he is to have an interest in the property; or derive a benefit from the sale; nor can he dispose of it for the benefit of his private friends.

The property of an estate in the hands of the administrator, is devoted by law to particular purposes; and it is a breach of trust in him to permit counteracting interests to divert it from its legitimate destination, or to diminish its value.

M. and his wife, as administrators of W., sold a large amount of property, which was purchased by S., who was the sister of M.'s wife, and a member of his family; several creditors of the estate objected to the probate court confirming the administrators' report of the sale, on the ground of fraud, and the administrators insisted on a confirmation of the report; it was proved that the property sold for less than one-third of its appraised value, and of what the witnesses proved it was really worth; that there were only four persons present when the sale commenced; that it was proclaimed on the ground that persons were coming to the sale, who wished to buy property that was to be sold, and were expected to arrive very soon, and did get there immediately after the sale was over; that the administrator, upon hearing that such persons were coming, instructed the auctioneer to proceed forthwith with the sale; that only one person besides S. bid at the sale, and he only on one lot of negroes; that his bid seemed to produce great surprise, and he was immediately taken aside and informed that the claim of his brother, for whom he was acting, should be secured in full, if he would agree to bid no more, to which he assented, and the note of S. with security was given for the amount of his brother's debt; that the claim which resisted the sale was also compromised, and the note of S., with security given for it; that a witness who attended the

sale, with the intent of bidding, before the sale commenced, asked M. if the family wished to buy the property, and was told that S. expected to purchase it; that S. was crying during the sale, and appeared very much affected when the bid was made in opposition to her; that in a conversation before the sale with one who was expected to buy the property for M., said he did not think any person would bid for the property against the children or against him, and he wished and expected to buy it very low; and that the administrators reported to the probate court, when they applied to have the estate declared insolvent, that the debts against the estate, amounted to \$14,504 and the assets to \$9,110: *Held*, that the testimony showed, beyond a reasonable doubt, that M. and his wife were not acting in good faith towards the creditors, and that they had concocted a plan by which the property should be sold for a trifle, and bought in for their benefit; and that sales so made are fraudulent in fact, and in law, and it is the duty of the probate court to set them aside and order the property to be resold.

The probate court may refuse to confirm an administrator's report of a sale fraudulently made, set aside the sale, and order the property to be resold, without notice to the purchaser at such fraudulent sale.

On appeal from the probate court of Claiborne county; Hon. William M. Randolph, judge.

On the 24th day of October, 1843, Lewis F. Moreland and Emily J. Moreland, administrator and administratrix of Josiah Willis, deceased, presented to the probate court of Claiborne county, their report of the sale of the personal estate of their intestate, showing an aggregate amount of two thousand two hundred and six dollars and sixty-two and a half cents. The report was received and ordered to be continued for further proceedings. At the February term, 1844, the Bank of Port Gibson, Elmer and Briscoe, and James J. Pearson, filed the following exceptions to the confirmation of the report, to wit:

"Because said sale is fraudulent, and was managed and contrived by, and between said Lewis and Emily Moreland, and said Mary Seybourne, the purchaser, for the purpose of defrauding the creditors of the estate of said Willis; and that they combined together to prevent bidders from attending the sale; and said Mary Seybourne personally urged bidders to stay away, in order that the property might be sacrificed and bought in for said Moreland. That they hastened the hour

of sale, knowing that bidders were on the road, for the purpose of getting the sale over before the bidders arrived, and succeeded in doing so. That the only bidder on the ground at the time of sale, was paid or secured the debt due him by the estate, notwithstanding the estate has been declared insolvent, and that the same was done to prevent him from bidding, and to procure a sacrifice of the property. That by these and other unlawful and fraudulent practices of said administrators, and said purchaser, the property of said estate was sold at greatly inadequate prices, some portions for not over one-tenth of its actual cash value. And the whole of said property was bid off by said Mary Seybourne in trust for, and for the benefit of, said Moreland and wife, or some of their family, to the great injury of the creditors of said estate."

The court overruled the exceptions, and ordered the report to be confirmed, to which the above-named creditors filed a bill of exceptions, setting out all the evidence, which was in substance as follows: The creditors, in support of their exceptions, read the inventory of appraisement, showing that the property sold by the administrators on the 14th day of October, 1843, was appraised by five disinterested persons on the 10th day of December, 1834, at six thousand six hundred and fifty-four dollars. They also read the schedule of the liabilities and assets of the estate, filed by the administrators under oath, on the 29th day of June, 1843, with their petition to the court to have the estate declared insolvent, showing liabilities to the amount of fourteen thousand five hundred and four dollars and thirteen cents, and assets to the amount of nine thousand one hundred and ten dollars. They then introduced Henry O'Kelly, who testified, that at the request of his brother William, who held a claim against Mr. and Mrs. Moreland, he attended the sale made by them as administrators of the estate of Josiah Willis, deceased, on the 14th day of October, 1843. The sale commenced about five minutes after twelve o'clock, he arrived about half an hour before that time. When the first lot of negroes was offered, five in number, he bid one thousand dollars for the lot, which appeared to create much surprise among

those present. Mary Seybourne then bid one dollar more, and became the purchaser; she cried, and appeared to be very much affected. That before another lot was offered for sale, John Taylor Moore held a conversation with him, and agreed to secure his brother's claim, and did hand him a joint note of Mary Seybourne and John Taylor Moore, for the debt due his brother. The other negroes were then sold in lots at much lower prices than he thought they ought to have sold for; that he did not wish to purchase, and stated, on the ground, that he only attended the sale to make the property bring its value, so that his brother's claim might be secured; he bid on the balance of the property very small prices, but he did not attempt to force it to bring its fair value; that the sale occupied about half an hour; the auctioneer dwelt a very short time, there being only three persons present to bid besides himself, the family, and James T. Marye, though there was enough time given to persons to bid had they wished to do so. On cross-examination, he stated that the claim of his brother against the estate consisted of a note made by Lewis F. Moreland and wife.

William O'Kelly testified, that he sent his brother to the sale to make the property bring its value, or secure his claim; that his claim against the estate consisted originally of an open account contracted by the administrators, and he took the note of Lewis F. Moreland payable on a certain day, which, if paid, would be a satisfaction of the account, if not, the account was to stand as a claim against the estate; that he afterwards took the note of Moreland and wife for the amount due, and stated on its face that the debt was contracted since the death of Josiah Willis, for the benefit of the estate; that the account was for goods; and that on the day of the sale his claim was taken up by the note of John Taylor Moore and Mary Seybourne, according to the agreement made with his brother at the sale. James T. Marye testified that he wished to purchase a negro, and attended the sale, in company with Henry O'Kelly, for that purpose; that when they arrived, only three persons, besides the family, were present. He asked Moreland if the family wished to purchase the property, and was told that Mary Sey-

bourne expected to buy it; that he knew Mary Seybourne was one of the family, and if the family wished to purchase the property, he would not bid; Mary Seybourne and Mrs. Moreland were sisters. No person bid for any of the property except O'Kelly and the purchaser. That he told the persons present that there were several gentlemen coming out from Port Gibson with the intention of bidding on the property, and would be there very soon; Moreland then asked if it was twelve o'clock, and being informed it was, he told the auctioneer to go on with the sale, which was done immediately, and the negroes were all sold before the gentlemen from Port Gibson arrived. When they arrived, it was about half after twelve o'clock. That Mary Seybourne appeared very much affected when O'Kelly bid on the property, but she purchased the whole of it, and it did not bring more than one-third of its value.

Albigence W. Putnam, testified that as one of the executors of Israel Loring, deceased, he held a bond, executed by Josiah Willis in his lifetime, in the penalty of two thousand dollars, to make a title to a tract of land; that Loring, in his lifetime, after the execution of the bond, purchased the same land from the lawful heir, and instituted an action of ejectment to recover it from Lewis F. Moreland and his wife, and Mary Seybourne, who claimed it; that at the December term, 1843, of the probate court, he filed exceptions to the report of sale of the personal property of Josiah Willis, deceased, which continued from term to term till the February term, 1844, when he compromised with Moreland all matters in controversy between them, dismissed the action of ejectment, gave up the title bond, and released the parties from all liability to the estate of Loring; and, as executor of the estate of Loring, executed a release of all claim to the land, in consideration that the purchase-money which had been paid by Loring should be refunded; and Mary Seybourne's note, with John Taylor Moore as surety, was given to him for fourteen hundred dollars, being the amount paid by Loring, payable in one, two, and three years, with interest from date; that the controversy in relation to the title bond had been the subject of much litigation; that he op-

posed the confirmation of the report of sale by the administrators, so that the property might be resold and bring its value; and inasmuch as he had no further interest in the estate of Willis, after the execution of the notes by Mary Seybourne and John Taylor Moore, he withdrew his exceptions to the report of sale.

John B. Thrasher testified, that as counsel for Moreland and wife, he prepared their report of the insolvency of the estate of Josiah Willis, deceased, and advised them as to the mode of conducting the sale of the property; that being informed Moreland expected him to buy in the negroes of the estate at the sale and hold them until Moreland could return him the money, he called on Moreland for the purpose of undeceiving him, and letting him know that he, witness, would not buy any of the property for him, and he then informed Moreland the negroes would have to bring their value, as there were several persons in Port Gibson who wished to buy negroes, and had the money to pay for them, and they would attend the sale and bid for the property; but Moreland said he did not think any one would bid against the children or himself for the negroes; that he wished and expected to buy them very low. Witness knew some of the negroes, one by the name of Tom, and wished to purchase him, and would have paid \$600 for him, but did not attend the sale in consequence of Moreland's wish to buy them all himself, or to have them bought in for him; that on the day before the trial in the probate court, Mrs. Moreland came to him in the streets of Port Gibson, apparently in great distress, and wished to know if he was their friend; she appeared surprised that he should appear against them in the probate court, and stated that she did not want the sale set aside; that she had raised the negroes, and Mr. Moreland would lose if the sale was set aside, because he had paid debts as administrator of the estate, and the property had not sold for enough to pay him back.

This was all the evidence offered on either side. From the decree of the probate court overruling the exceptions to the report of sales, and ordering the report to be confirmed, the credi-

tors, James J. Pearson and others, prayed an appeal to this court.

Thrasher and Sillers, for appellants.

An administrator is a trustee for the creditors and distributees of the estate, and the assets constitute a trust fund in his hands to be applied in the first place to the payment of debts. *Cable v. Martin & Bell*, 1 How. 561; 1 Story's Eq. 506; *Planters Bank v. Neely*, 7 How. 95.

In adverting to the cases on the subject of trusts, we find that trusts are enforced, not only against those persons rightfully possessed of the trust property, as trustees, but also against all persons who come into possession of the property bound by the trust with notice of the same, and to no persons, says Judge Story, can these considerations more appropriately apply, than to administrators and those claiming under them with notice of the administration and assets. 1 Story's Eq. 507. In the case under consideration the purchaser was the sister of the administratrix, living in the family with the administrator and wife, and was evidently used as an instrument in their hands to carry out the stupendous fraud which they had concocted to purchase in the property, without competition, at a reduced price, and on their own account.

The testimony is that the sale commenced five minutes after 12 o'clock, that the bidders arrived from Port Gibson at half past 12 o'clock, and that the negroes were all sold before they arrived. Notwithstanding that the administrator had been informed that bidders were on the road, and would arrive very soon, yet he hurried on the sale, and had twenty-two likely negroes sold, at an average of seventy-eight dollars per head, in fifteen or twenty minutes, being an average of but about one minute to the negro, in point of time, and all before the bidders could arrive. Such indiscreet haste and ruinous sacrifice demand that a corrective should be applied. 7 How. 9.

But this was not all: no sooner did H. O'Kelly bid on the first lot of negroes put up for sale, than Mary Seybourne, the purchaser, commenced crying, and appeared much dis-

Pearson et al. v. Moreland et ux.

tressed, and the sale was suspended until H. O'Kelley could be bought off from bidding at the sale, by the note of Mary Seybourne and John Taylor Moore.

But the testimony does not stop here. W. Putnam, being a creditor, as one of the executors of J. Loring, filed exceptions to the report of the administrator's sale, and the exceptions were to be tried in the probate court. Moreland in person settled his claim, amounting to \$1400, to get him to withdraw them; and again the joint note of Miss Mary Seybourne and John Taylor Moore was executed for the full amount of his debt, notwithstanding the report of insolvency, for no other conceivable consideration, but that of withdrawing his exceptions to the sale.

That the administrator and administratrix, in connection with the purchaser, in this case acted in bad faith, and combined and confederated together for the purpose of defrauding the creditors, we think most manifest from the evidence. In fine, that in the language of this court, "it is not possible to wink so hard as not to see the true character of this transaction, and not to perceive in it a contrivance to secure the property to the family, without the slightest regard to the rights of creditors, who had the first claim upon it." 7 How. 95.

The appellees contend that the order conferring the sale ought to be confirmed. First, because it does not appear that Mary Seybourne was made a party to the proceedings. And secondly, that there was no evidence showing any collusion or combination between the purchaser, Miss Seybourne, and the administrators or persons present, to prevent bidding. It is true that there is appended to the bill of exceptions, such an extra-judicial statement; but it is equally true, that the record proves the converse of the proposition. This extra-judicial statement can have no influence with this court; it would be an idle ceremony to embody the testimony in a bill of exceptions for the benefit of this court, if the inferior tribunal had the power to decide for this court, what had or had not been proved by such testimony.

If Mary Seybourne was not before the probate court, defend-

ing the sale, and if she is not before this court defending the same, then the administrators are defending it on their own account, and Mary Seybourne falls within the rule decided in case of *The Planters Bank v. Neely*, 7 How. 94. In that case no notice was deemed necessary. The sale was inchoate, and no title passed until it was confirmed. Courts, however, will not permit parties to hold property acquired through the fraud of third persons. Story's Eq. 258. It is sufficient that Mary Seybourne knew that she was purchasing at administrator's sale. 1 Story's Eq. 507.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The appellants filed exceptions in the probate court to the report of sales of the personal property of Josiah Willis, deceased, on the ground of fraud committed by the defendants in error in making the sale. Mrs. Moreland was the wife of Willis, and after his death intermarried with Moreland. They reported the estate insolvent, and obtained an order of sale, and proceeded to sell the slaves at very low prices, not one-third of their value, to Mary Seybourne, a sister of Mrs. Moreland, and an inmate of the family.

To establish the fraud the plaintiffs introduced the appraisement, and a report made by the administrators to the probate court, showing the liabilities of the estate to amount to \$14,504, which also valued the assets, principally slaves, at \$9,110, which report constituted the foundation of the application to sell the property, and was made under oath. Several witnesses were also examined to show the manner in which the sale was conducted, together with the conduct of the administrators in regard to certain debts due from the estate.

The existence of fraud must generally be gathered from circumstantial proof, as it is usually perpetrated in such a manner as to exclude the possibility of establishing it by positive proof. The circumstances in this case are such as lead irresistibly to the conclusion that the administrators were acting in bad faith to the creditors, by having the property sold under its value, with a view to their own benefit, or for the benefit of a confi-

dential friend. It is the paramount duty of an administrator to protect the interests of creditors by using every effort to make the property under his charge sell for the best price. Creditors have the first claims upon it, and the law and his oath of office, both require that he should administer in good faith. He cannot purchase at his own sale, either directly or indirectly; nor can he sell under a secret trust, or private understanding that he is to have an interest in the property, or to derive a benefit from the sale. He cannot use or dispose of the trust property for his own benefit, or for the benefit of his private friends. It is devoted by law to particular purposes, and it is a breach of trust in the administrator to permit counteracting interests to divert it from its legitimate destination, or to diminish its value. *Planters Bank v. Neely*, 7 How. 80; *Michoud v. Girard*, 4 How. S. C. R. 503.

In the first place by this controversy the administrators are insisting that the report of sale shall be approved and confirmed, when it is obvious that the property did not bring more than a third of its value, as established by the appraisement, by their own report under oath, and by the testimony of witnesses, when too the purchaser is a sister of one, a sister-in-law of the other, and a member of the family. A strict regard for the rights of creditors should induce a desire on the part of the administrator to have a sale of property at prices so greatly under its value, set aside. But an opposite desire seems to prevail with these administrators, and, under the circumstances, this alone is calculated to create doubts whether they did not permit their private interests to have an undue weight in making the sale.

But the testimony of the witnesses is still more conclusive on this subject. Henry O'Kelly attended the sale as the agent of his brother, who was a creditor, with instructions to make the property bring its value, or to secure the debt of O'Kelly. He arrived about half an hour before the sale, which commenced about five minutes after twelve o'clock, when but three persons besides the witness were present. The witness bid \$1000 for the first lot of negroes put up, consisting of five in number; Mary Seybourne bid one dollar more and was declared the pur-

chaser. The bid made by O'Kelly seemed to create great surprise amongst the persons present, and before another lot was offered the witness received a proposition through John T. Moore that his brother's debt should be settled, to which he acceded, and which was accordingly done during the day, to the full amount, by the joint note of Mary Seybourne and J. T. Moore. He did not know that Mary Seybourne knew this proposition had been made. The rest of the negroes were then put up in lots, and sold at prices greatly below their value, the auctioneer dwelling but a short time on the bids, as but few persons were present, though sufficiently long to have enabled the persons present to bid.

James T. Marye went to the sale in company with O'Kelly, and went for the purpose of purchasing negroes. He asked Moreland if the family wished to buy the property, and was answered that Mary Seybourne expected to purchase it; the witness then said he would not bid, and accordingly did not, nor did any other person except O'Kelly and Mary Seybourne. The witness stated to the persons present at the sale that there were several gentlemen coming out from Port Gibson to bid for the property, and would be there very soon. Moreland asked if it was twelve o'clock, and on being informed that it was, directed the auctioneer to proceed, which he did, and sold the negroes before the bidders arrived, which they did at about half past twelve o'clock. Mary Seybourne was crying during the sale, and appeared much affected when O'Kelly bid. She purchased all the property, which did not bring more than one-third of its value.

It seems also that A. W. Putnam had a claim against the estate of Willis for a sum of money on which a suit was pending. He had also brought an action of ejectment against Moreland and wife for a tract of land, which had been sold to Putnam's testator, for which the money claimed had been paid, but the title had been acquired from another source, as it was not in Willis when he sold. As a creditor he had filed exceptions to the confirmation of the report, in order that the property might be resold for its value. But shortly before the exceptions were to be

tried, he compromised the whole matter with Moreland, and received the joint note of Mary Seybourne and John T. Moore for the amount of money which had been paid on the purchase of the land, and thereupon withdrew his exceptions to the report.

The testimony of J. B. Thrasher, is still more conclusive, in showing the motives and plan of Moreland. As counsel, he prepared the report of insolvency, and gave general instructions as to the mode of conducting the sale. He afterwards learned that Moreland expected him to buy the property, and hold it until he (Moreland) could pay for it, and for his benefit. On an interview with Moreland, Mr. Thrasher undeceived him, by informing him that he would not buy the property. He at the same time told Moreland that the negroes would have to sell for their full value, as several persons in town, who had money, wished to buy such property, and would attend the sale. To this, Moreland replied that he did not think any one would bid for the negroes against the children, or against him; that he wished and expected to buy them very low. The witness knew some of the negroes, and would have purchased one of them, (Tom,) at six hundred dollars, but, in consequence of Moreland's declarations, did not attend the sale. Mrs. Moreland had met him the day before in the street, and expressed great surprise and regret that he should appear against them, as she did not wish the sale set aside.

This testimony shows, beyond a reasonable doubt, that the administrators were not acting in good faith towards creditors, and that they had concocted a plan by which the property should be sold for a trifle, and bought in for their benefit. The facts will justify no other conclusion. When O'Kelly manifested a determination to bid, he was soon given to understand that his debt would be settled, which was done to the full amount, although the estate, at a fair valuation, was not able to pay more than two-thirds of the amount. Can it be believed that the administrators were ignorant of this arrangement? Why did the administrator press the sale, by directing the auctioneer to proceed, when he had been informed that other bidders were coming, and would soon be there? A due regard for

Pearson et al. v. Moreland et ux.

the interests of creditors should have induced him to delay until they arrived. His duty demanded delay, but his interest required expedition, and prevailed. Why was Putnam's claim compromised, and his objections to the sale consequently withdrawn? The compromise was made with Moreland, but he did not give his note; Mary Seybourne and John T. Moore gave theirs, as they had done to O'Kelly. But Moreland had furnished the key which unlocks this mystery, by his declaration to Thrasher. He did not think any one would bid against the children, or against him, and he expected to purchase the property very low. Mary Seybourne, however, who was one of his family, was substituted in his place, as the purchaser. He told, in advance, that she intended to buy it. This declaration was made to a witness, who had gone there for the purpose of bidding, but who said he would not bid if the family wished to buy the property. Instead of inviting bidders, he kept them away from the sale, and so managed as to keep those persons from bidding who had attended for that purpose. Sales so made are fraudulent, in fact and in law, and it is the duty, as it is the province, of the probate court to set them aside, and order the property to be resold.

But it has been insisted that the judgment must be affirmed, because the sale could not be set aside, in the probate court, without making the purchaser a party, which she was not, as no notice was given her of the proceedings in that court. If for this reason no judgment could have been given against her, it is certainly not a good reason why judgment should have been given in her favor, when the facts did not entitle her to judgment. If notice was necessary, the court should have suspended the proceedings until it could have been given. On the authority of the *Planters Bank v. Neely*, 7 Howard, 80, the judgment must be reversed, and the sale set aside.

SAMUEL D. LAUDERDALE and ELIAS E. BYRN and JOSEPH WADDLE,
Administrators of Addison Peel, *vs.* **CHARLES HALLOCK and**
GILBERT BATES.

A deed of trust made by P. to secure all judgments outstanding and unsatisfied against P. or the firm of B. & P., cannot be held to embrace a judgment against L. & P.

Parol testimony, to explain or vary the terms of written instruments, is received with great caution and distrust; yet such evidence is admissible to explain mistakes in a deed.

P. executed a deed of trust to secure, first, all judgments outstanding and unsatisfied against P. himself, or B. & P.; secondly, a note to C. executed by L. & P. and indorsed by S. D. L. and others, and after that to pay certain other specified debts; H. & B., who held an unsatisfied judgment against L. & P., filed a bill to recover from S. D. L. about \$1300, paid to him out of the trust fund on account of the note to C., alleging that by the terms of the deed of trust they were preferred to S. D. L. or to C.; it was proved by the draftsman of the deed of trust, who was also one of the attorneys who recovered the judgment in favor of H. & B., that the judgment of H. & B. was not intended to be secured by the deed of trust; and if the words of the deed embraced that judgment, it was a mistake of the draftsman of the deed: *Held*, that the judgment of H. & B. was not secured by the deed of trust, and their bill should be dismissed.

ERROR, from the district chancery court at Columbus; Hon. Joseph W. Chalmers, vice-chancellor.

On the 28th day of June, 1841, Charles Hallock and Gilbert Bates, copartners, under the name and firm of Hallock & Bates, filed in the district chancery court at Columbus, their bill against Elias E. Byrn and Joseph Waddle, administrators of Addison Peel, deceased, and Samuel D. Lauderdale, alleging that complainants recovered judgment in the circuit court of Lowndes county, on the 20th day of October, 1838, against James S. Lauderdale and Addison Peel, who were merchants and partners in trade, under the name and style of Lauderdale

Lauderdale et al. v. Hallock et al.

& Peel, for the sum of four thousand six hundred and twenty-seven dollars and ninety-six cents, upon which judgment various writs of *feri facias* had been issued, and all returned *nulla bona*, except the last, and upon that only one hundred and thirty-five dollars and forty cents was made; and that the residue of the judgment was still unpaid; a transcript of the record in the case in which the judgment was rendered was made an exhibit to the bill; that on the 23d day of March, 1838, Addison Peel transferred and assigned to Joseph W. Byrn all his goods and chattels, rights and credits, to sell and collect the same, and apply the proceeds thereof to the payment,—first, of all judgments then outstanding and unsatisfied against him, Peel, and afterwards to various purposes therein specified; and he made a copy of the deed of trust an exhibit to the bill; that at the time the deed of trust was executed the judgment in favor of complainants was the only one in existence against Peel; that Byrn has, since the execution of the deed of trust, died, and Elias E. Byrn and Joseph P. Waddle administered upon his estate, and took upon themselves the burden of the trust, and proceeded to execute the same, and raised from the trust fund the sum of three thousand dollars, or thereabouts, which should have been applied to the payment of complainant's judgment; but instead of doing so the administrators paid it over to Samuel D. Lauderdale; that complainants have demanded the money from the administrators, and from Samuel D. Lauderdale, and they refused to pay it over, pretending that Lauderdale was entitled to it under the provisions of the deed of trust. The prayer was, that the administrators be compelled to state and show what amount of money had been realized from the trust fund, how much remained on hand, what amount of assets were not sold or collected; and that they and Samuel D. Lauderdale be compelled to pay to complainants whatever money had been received from the trust property, and for general relief.

The defendants filed a joint and several answer, which admitted the execution of the deed of trust by Peel, and that thirteen hundred and fifteen dollars had been realized from the trust property, and paid over to Samuel D. Lauderdale;

that judgment was confessed by James S. Lauderdale and Addison Peel, as partners under the firm of Lauderdale & Peel, at the time and for the sum stated. But the answer averred, that at the time of confessing the judgment, Lauderdale & Peel informed the attorney of complainants, that they were the owners of a tract of land situate in the county of Octibbeha; that they desired the judgment to be satisfied and confessed the same upon the express agreement, on the part of the attorney of the complainants, that he would cause execution to issue upon the judgment and have the same levied upon said lands and apply the proceeds arising from a sale thereof to the payment of the judgment. Lauderdale & Peel and the attorney of complainants all at that time believed the land would sell for enough to satisfy and extinguish the judgment; that execution issued upon the judgment and was levied on the land, which was sold, and produced only \$135 40. Respondents further say that at the time of making the assignment, Lauderdale & Peel fully believed that the land would sell for enough to satisfy the judgment of complainants; that Addison Peel did not intend first to provide for the payment of the judgment in favor of the complainants, but on the contrary it was his avowed and express purpose and intention to exclude their judgment from the benefit of the assignment, until Samuel D. Lauderdale should be fully indemnified against the liabilities mentioned in the assignment; which intention and purpose was avowed and made known to the attorney of complainants; that the true intention and object of the assignment, was first to provide for the payment of a certain judgment in favor of Maltby and Starr, against Addison Peel, and secondly to indemnify Samuel D. Lauderdale as indorser of Lauderdale & Peel. And respondents aver that the clause contained in the assignment which provides for the satisfaction of all judgments then outstanding against Addison Peel, was not intended to embrace complainants' judgment against Lauderdale & Peel, nor any other judgment, except the one of Maltby & Starr. And if the assignment shall be construed as embracing judgments against Lauderdale & Peel, the same was so made by mistake. That the sum of \$2250 only, has been raised

under the assignment, all of which has been paid to the preferred creditors and the residue of the property named in the assignment is valueless.

The defendant proved by Samuel F. Butterworth, that the object of the deed of trust, after paying expenses, was first, to secure to Maltby and Starr, of Mobile, Alabama, the amount of a judgment due to them from Peel, and second, to secure to the Commercial Bank of Columbus the note mentioned in the deed of trust, on which Samuel D. Lauderdale was security. The avowed object of Peel, at the time of executing the deed of trust, was to secure Samuel D. Lauderdale before all other persons except Maltby & Starr; that some time before the deed of trust was made, Peel confessed judgment in favor of complainants, and the judgment was entered against Lauderdale & Peel. Peel then stated to deponent (who was attorney for complainants, that he owned a valuable tract of land in Octibbeha county, which he was willing to give to complainants in payment of their demand. To effect this, deponent advised the confession of the judgment above mentioned, in order that the lands might be sold under the judgment, and the complainants thereby obtain a clear and perfect title. There was no specific agreement between deponent and Peel that the land should be taken by complainants in satisfaction of their judgment, but both Peel and deponent believed that the land would sell for enough to pay the judgment. The deed of trust, mentioned in the answer, was drawn by deponent. Peel refused to execute it unless Samuel D. Lauderdale was secured next after Maltby & Starr.

On cross-examination, he stated that when the deed of trust was executed, no mention was made of any judgment except that of Maltby & Starr, and the first clause in the deed was to provide for that judgment; Peel expressed no intention to exclude any judgment from the deed of trust, but he avowed the intention to prefer no claim to Samuel D. Lauderdale except Maltby & Starr.

Tilghman M. Tucker proved that he knew of no inducement to Peel to make the deed of trust, but to provide for Samuel D. Lauderdale as security for Lauderdale & Peel; that he was

consulted as to the best manner of indemnifying Samuel D. Lauderdale, and he advised the execution of the deed of trust as the best; that he was one of the attorneys of Hallock & Bates, and recollects that it was expected by Peel, when he confessed said judgment, that a tract of land owned by him in Oc-tibbeha would be received, or the proceeds of the sale thereof, in payment of the judgment so confessed; deponent thinks that no doubt was entertained by Peel, or by deponent, or Butterworth, who was then associated with deponent in the practice of the law, that the land would be received in satisfaction of the judgment, and would fully pay it, as it was supposed to be of at least the value of the judgment, and most probably of greater value. Deponent thinks that Peel understood that the tract of land was to be received in discharge of the judgment, and that the attorneys of complainants, Tucker and Butterworth, had agreed with him to receive the tract of land in payment of the judgment, which was not the fact. Deponent recollects that Tucker and Butterworth were anxious to save complainants' debt, and deemed it almost the only means to effect that object, to get the judgment confessed at the time it was done; and deponent recollects that he then was of opinion that getting the judgment confessed at the time would effectually secure the payment of the debt by being a lien on said tract of land. For some reason, which deponent does not recollect, if he ever knew, complainant did not take the land for the debt, and the land was sold under the judgment, and for some reason, perhaps some supposed defect of Peel's title, the land sold for a very small sum of money; he did not think the deed of trust was intended to secure the payment of complainants' judgment.

The reason deponent has for believing that judgment was not intended to be secured by the deed of trust, was, that the lien on the land would be ample security. Peel was peculiarly anxious to secure Samuel D. Lauderdale from liability as security for himself and his partner James S. Lauderdale.

On cross-examination, he said he knew of no other reason why the judgment of Maltby & Starr was included in the deed of trust, than that it was in judgment, and was a lien on the

Lauderdale et al. v. Hallock et al.

grantor's property, and did not know that that was the reason. The object of the deed of trust was to secure Samuel D. Lauderdale.

On the 10th day of November, 1842, the vice-chancellor rendered a final decree, ordering Samuel D. Lauderdale to pay to the complainants twelve hundred and eighty dollars, that being the amount due him by the administrators, and in default of payment that execution issue therefor; and also that the administrators pay to the complainants one hundred and fifty-seven dollars, money paid out by them without authority. To reverse that decree, the defendants now prosecute this writ of error.

R. Evans, for plaintiffs in error.

Adam Y. Smith, for defendant in error, cited 1 How. 333, 334; 2 How. 718; 1 Bro. 94; 6 Ves. 332, 333, and 328; 2 J. C. R. 596; *Rankin v. Atherton*, 3 Paige, 143.

Mr. Justice CLAYTON delivered the opinion of the court.

In March, 1838, one Addison Peel made a conveyance of all his estate and effects, consisting mostly of choses in action, in trust, first, to pay all judgments outstanding and unsatisfied against said Peel, and against the late firm of Brichell & Peel. Secondly, to secure a note to the Commercial Bank of Columbus, Mississippi, executed by Lauderdale & Peel, with Samuel D. Lauderdale and others as sureties, and after that to pay certain other specified debts. Before the date of this deed of trust, the appellees, Hallock & Bates, had recovered a judgment in the circuit court of Lowndes county, against James S. Lauderdale and Addison Peel, partners under the style of Lauderdale & Peel, for \$4,600. But a small portion of this judgment was made under their execution.

The trustee under the deed of trust, collected some three or four thousand dollars, and paid first, a judgment in favor of Maltby & Starr, and next, about \$1300 to S. Lauderdale, on the note due the Commercial Bank at Columbus, which is the debt provided for in the second clause. This bill is filed against Samuel

Lauderdale and others, to recover the sum so paid by the trustee, upon the ground that it was a mis-application of the trust fund, and that their debt was of the first class, and entitled to priority under the deed.

The answer denies this right of priority of the complainants. It states that the judgment in their favor was confessed by Addison Peel, under an agreement with their attorney, that the judgment should be satisfied by a tract of land, owned by Peel, in Octibbeha county; but that the land was afterwards sold for a very small sum. It insists that the intention of Peel was to secure the defendant next to the judgment of Maltby & Starr, and that if the judgment of the complainants be embraced in the general description contained in the deed, it was by mistake.

The depositions of Tucker & Butterworth, who were the attorneys of Hallock & Bates in procuring the judgment, and one of whom likewise drew the deed of trust, were taken. They were both consulted, and they both fully sustain the answer, that the great leading object of executing the deed of trust was to secure Samuel D. Lauderdale, and that the claim on which he was indorser was therefore placed next the judgments. Tucker also states, that Peel understood the agreement with the attorneys of Hallock & Bates to be, that the tract of land was to be received in discharge of the judgment, and that he knew of no object for executing the deed, but to secure S. D. Lauderdale.

The vice-chancellor decreed in favor of the complainants, from which decree an appeal is taken to this court.

The contest is for priority between the respective parties. It is to be observed, in the first place, that the judgment of the complainants is against the firm of Lauderdale & Peel, and so does not fall literally within the trust deed, the provisions of which are for judgments against *Peel* himself, or *Brichell & Peel*. The kind of judgment entitled to priority under the deed, is the very pivot and turning-point of the controversy, and we cannot say that a judgment against Lauderdale & Peel was intended to be embraced by the deed.

If the depositions in the cause be looked to, then the intention to exclude the judgment of complainants, is still more apparent. The attorneys who were consulted on the occasion and who drew the deed, testify positively that it was the intention to give preference to Lauderdale. If the deed do not secure the object, it is so drawn by mistake.

Parol testimony to explain or vary the terms of a written instrument, is received with great caution and distrust. It is admissible even in equity, only in a few instances. *Pegens v. Mosby & Kyle*, MS.; *Gresley's Eq. Ev.* 205. But mistake is one of the exceptions in which it is admissible.

Here the answer alleges, that if the deed bears the construction contended for by the complainants, it was so drawn by mistake. The testimony clearly establishes the fact. Viewing the testimony with all the caution and distrust, which we are admonished by the authorities it is proper to exercise in cases of this sort, we are still led to the conclusion, that this evidence does fully sustain the answer. We adopt this conclusion, too, the more readily, because it accords with the literal terms of the deed.

The complainants do not, in their bill, at all rely upon their judgment lien, but go entirely upon the deed of trust. Our opinion, therefore, rests upon the construction of the deed alone, without reference to the judgment lien, if under the circumstances they have any. No facts are set out to elicit an opinion upon such point.

The decree of the court below is reversed, and the bill dismissed.

JOHN DELAFIELD et al. *vs.* RICHARD W. ANDERSON.

A bill to set aside a sale of land, under execution, making the several purchasers at the sale, though they bought different and distinct interests, and the plaintiffs in the execution, under which the sale was made, all defendants, is not multifarious, on account of an improper joinder of parties.

Inadequacy of price, without fraud, is not a sufficient ground for setting aside a sale of land under execution.

The interest of a party in land, who holds only a bond for title when the purchase-money is paid, and who has paid only a part of the purchase-money, is not subject to sale under an execution at law.

ON appeal from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

On the 15th day of July, 1844, Richard W. Anderson filed, in the superior court of chancery, a bill against John Delafield, Joseph D. Bean, Knowles Taylor, Morris Ketchum, Benjamin Curtis, John Bolton, Charles Atway, David Hubbard, Richard Bolton, James H. Dearing, Isaac Mayfield and James Canniway, alleging that in 1835 or 1836, a large company or association of men, known as the "New York and Mississippi land company," was formed for the purpose of trading in lands in Mississippi; among other members of the company, were John Delafield, Joseph D. Bean, Knowles Taylor, Morris Ketchum, Benjamin Curtis, and John Bolton, who were elected trustees of the company, and in their names all the titles to lands belonging to the company were taken, and by them all sales and conveyances were made; that on the 8th day of October, 1836, the company, by their lawful agents and attorneys in fact, David Hubbard and Richard Bolton, contracted and sold to him ten sections of land, described in the bill, for thirty-one thousand dollars, one-third payable in cash at the time of the purchase, and the balance in two equal instalments, at one and

two years, and in pursuance of that contract, he paid in cash, seven thousand five hundred dollars, which was all the money he then had on hand; and for the residue of the cash payment, he gave his note, payable on the first day of March, 1837, with interest from date, and for the balance of the purchase-money, he gave his two bills single, for the sum of ten thousand three hundred and thirty-three dollars each, payable on the 1st day of October, 1837 and 1838, and took from the company a bond conditioned to make a good and sufficient title, in fee simple, to the land, upon the payment of the purchase-money, which bond was made an exhibit to the bill; that the note given for the residue of the cash payment, due on the 1st day of March, 1837, was paid at maturity; that on the 3d day of January, 1838, the company sold to him another section of land, for which he paid in hand, six hundred and forty dollars, and gave two notes for six hundred and forty dollars each, payable on the 8th day of October, 1838 and 1839, and took from them a bond, which was also conditioned to make a title when the purchase should be paid, and that bond was also made an exhibit to the bill; that from unfortunate pecuniary embarrassments he was unable to pay either of his notes or bills single, when they became due, and on the 9th day of July, 1842, suit was instituted against him, in the circuit court of Monroe county, on one of his bills single, and on the 24th day of April, 1843, a judgment was rendered against him for ten thousand three hundred and thirty-three dollars debt, and three thousand seven hundred and fifty-four dollars and thirty-two cents damages, besides costs of suit; upon which judgment an execution was issued, directed to the sheriff of Chickasaw county, who levied the same on 2629⁹/₁₀₀ acres of land, for which complainant, in the year 1836, paid the government of the United States, at the rate of one dollar and a quarter per acre, and on the 14th day of August, 1843, the sheriff sold the whole of the land levied on, to Joseph D. Bean and others, agents of the company, for two hundred and ninety dollars, and executed to them a deed therefor, which was made an exhibit to the bill; that when the levy and sale were made, he was out of the state, and knew nothing of either

until the sale was over; that the price for which the land was sold, was grossly inadequate, as either section was worth, at least, three dollars per acre. The complainant further charges that another execution was issued on the same judgment, directed to the sheriff of Monroe, and levied by him on the 4th day of September, 1843, on ten sections of land, and sold all of them to Joseph D. Bean and others, trustees of the company, for five hundred and five dollars; that eight of the ten sections were the same purchased by him of the company, as above stated, for which he only held a bond for title, when the purchase-money was paid, and at least two-thirds of the purchase was unpaid at the time of the sale, and no portion of it had been paid since; that he therefore owned only an equitable interest, which he was advised was not subject to sale under an execution at law, and that the sale to the company, or their trustees, by the sheriff, was void; the deed from the sheriff of Monroe to the purchasers was also made an exhibit to the bill; that two of the sections sold by the sheriff of Monroe to the trustees of the company, being part of the ten sections above-mentioned, were purchased by him of Henry Anderson and William Winston, and held their bond to make him a title, when the purchase-money was paid, and that all of the purchase was still unpaid, so that the sale of those two sections was also void; that since the sale by the sheriff of Monroe, the trustees of the company had contracted to sell, or had sold, to James H. Dearing, two sections of the same land, for twelve thousand seven hundred and ninety-nine dollars, which sale he was willing to ratify, if they would have placed the proceeds thereof to his credit, but they refused to do so; that another execution was issued on the same judgment, and on the 15th day of April, 1844, one-quarter section of land was sold by virtue thereof, to Isaac Mayfield, for fifty dollars, which complainant subsequently sold and conveyed to Mayfield, for four hundred and ninety-six dollars; and another quarter section was sold to Isaac Mayfield and James Canniway, for fifty dollars, which was worth five hundred dollars; these two quarter sections were not part of the same land purchased by complainant of the

company. The bill charges that these various acts of the company were greatly prejudicial to his interest, inasmuch as the company pretended to be the owners of all the land purchased by them at the sheriff sales, and stated that complainant had abandoned his contract; and they had thereby broken off many advantageous trades, in relation to the land, which had been previously made by him; that he had paid the company for the land about eighteen thousand dollars, including interest, and been at great expense and trouble about the same; and he then had an opportunity of reimbursing his outlay, if he was not prevented by the clouds and incumbrances which the sheriff's sales and deeds to the company cast over his title. The prayer was, that the several sales made by the sheriffs be set aside, and the deeds executed by them, be delivered up and cancelled, and that the deed to Dearing be also delivered up and cancelled, or that the whole contract with the company be rescinded, and they be decreed to refund to the complainant the money he had paid them, with interest, and that the land be sold for the payment thereof; and that they also be compelled to reconvey to the complainant all the land purchased by them at the several sheriff's sales, which he had not previously bought from them. To this bill the defendants demurred. On the 7th day of January, 1845, the chancellor overruled their demurrer, and they appealed to this court.

William G. Thompson, for appellants.

The cause of demurrer assigned, specially, is multifariousness. The several purchases complained against are wholly unconnected. The purchasers, it is true, all claim under the same judgment against the complainant. In this point they are all interested; at this point they are all connected. But they are not brought into this cause on the ground that they claim under the judgment. The judgment itself is not complained against. It is only when several persons have a common interest in the point of litigation, that they can be joined in one suit. The judgment is not the point of litigation here. The complainant does not pretend that the judgment is invalid

or satisfied, and that sales ought not to be made under it. The only grounds of complaint are, that although the judgment and the executions are valid and good, the executions ought not to have been levied on the particular parcels of property mentioned in the bill, as to two of the executions, and as to the other, although the levy was proper, the sale should be set aside for inadequacy of price. Now in respect to these grounds of complaint, or points of litigation, the defendants are wholly unconnected. Their purchases were made in several different counties, under several different executions and levies. There is no sort of privity between them, in regard to the several levies and sales, and the several executions. It is only the levies and sales which are attacked. The levies and sales form the points of litigation. In these points the defendants have not a common interest. Any one of the levies and sales may be set aside and all the rest sustained. There is no sort of connection between them. It would be otherwise if the bill sought to set aside the judgment, if that were the point of litigation. In that case there would be, in regard to the object of this suit, a connection between the several executions, levies and sales, and a connection between the several purchasers. Several defendants cannot be united in one suit, unless they have a common interest in the point of litigation. The several purchasers here have a common interest under the judgment; but the judgment does not form the point litigated. The complainant does not assert one general right against all the defendants. If he asserted a right to relief against the judgment, it might be considered perhaps one general right against them all. But he seeks no relief against the judgment. The bill seeks to set aside one or more of the purchases on the grounds of inadequacy of price and surprise; and others, on the ground that he had not such an interest in the land as can be sold under execution.

William Yerger, for appellee.

A bill is said to be multifarious where it improperly joins several distinct and unconnected matters against the same defend-

ant, or the demand of several matters of distinct natures against several defendants. Story's Eq. Pl. 225.

But a bill is not to be treated as multifarious because it joins two good causes of complaint growing out of the same transaction, where all the defendants are interested in the same claim of right, and where the relief asked for is of the same general character. Story's Eq. Pl. sec. 284-286.

The case of *Wright v. Shelton et al.* is directly in point, and settles this demurrer in favor of complainants. 1 S. & M. Ch. R. 399; see also the case of *Martin, Pleasants & Co. v. Glasscock et al.* 1 S. & M. Ch. R. 17; I would also refer to the case of *Voorich v. Smith*, 5 Paige's R. 160.

A demurrer will not be sustained for multifariousness which contains two distinct subject-matters wholly disconnected, if one of them is out of the jurisdiction of a court of equity, for redress. Story's Eq. Pl. 232; 5 Paige, 137; 1 S. & M. Ch. R. 17.

Testing this case by the above rules, and it can clearly be sustained. It is a bill filed against several defendants it is true, to set aside several sales made to them, but the sales were made under the same execution. It is the same general claim of right, to wit, a right to have them set aside because of inadequacy of price, and of want of legal interest subject to sale. All the defendants claim by virtue of sales made under the same execution, all of which sales are alleged to be illegal, and proper to be set aside; so that it is the case of a complainant having a single cause of complaint against several defendants claiming under the same right, or of a complainant having two good causes of complaint growing out of the same transaction against several defendants.

As to the general equity of the bill I refer the court to the cases of *Moody v. Farr*, 6 S. & M. 100, and *Goodwin v. Anderson*, 5 S. & M. 730.

Gholson, for appellants.

It is contended, on the part of the appellants, that the decision of the chancellor, overruling the demurrer to the bill, should be

reversed, and that the demurrer should be sustained by this court, and the bill dismissed.

1. The bill is multifarious, because it embraces three distinct and independent matters, involving separate inquiries. 1 Story's Eq. Pl. sec. 271.

But it is still more clearly multifarious in another point of view. Under the executions before referred to, a sale of part of the lands to which the complainant had a legal title, was made to Delafield and another, and of another part to Mayfield and Canniway. This bill brings both sets of purchasers before the court, and seeks to set aside both sales. Had the complainant himself made the sales, he might with the same propriety have joined them in the same bill, to obtain a rescission of the contract of sale, or a specific performance. 1 Story's Eq. Pl. sec. 272.

2. The demurrer should also have been sustained, because it appears from the bill that the complainant is not entitled to any relief.

There are two grounds on which the relief asked by the complainant mainly rests; 1st. As to the lands to which he had a legal title, that they were sold at an inadequate price; and 2d. As to those in which he had an equitable interest; that such interest was not subject to sale under an execution at law. If the complainant cannot maintain these grounds, his whole claim to relief fails.

In relation to the first ground, this bill presents the naked question, whether, without any allegation or suggestion of fraud, a sale under the regular process of a court of law will be set aside in equity, on the main ground of inadequacy of price?

That judicial sales by public auction will not be set aside in equity on this ground, is believed to be a clear and well settled principle. It has been admitted by the chancellor, whose decision is now under consideration, that the inadequacy of price must be connected with other facts tending to show fraud and unfairness. *Newman v. Meek*, 1 Freeman's Ch. R. 458; *Reynolds v. Nye*, Ibid. 469.

The next question, whether an equitable interest in lands can be sold under an execution at law, depends entirely on the construction to be given to the statutes of this state; unless the authority to make such a sale can be found in the statutes, it is admitted, that, upon general principles, and upon the authority of decisions in other states, it cannot be made.

The 1st section of the act concerning executions gives a writ of *feri facias* for taking the goods and chattels, lands and tenements of the defendant, against whom a judgment is rendered. Subsequent sections provide for the mode in which lands and tenements may be sold; and the 48th section (How. & Hutch. 644,) is in these words: "When lands and tenements shall be sold, according to the provisions of this act, by virtue of any writ of *feri facias*, *capias ad satisfaciendum*, or *venditioni exponas*, or other legal process, it shall be the duty of the sheriff or other officer, by whom such sale shall be made, on the payment of the purchase-money, to execute to the purchaser or purchasers, such deed or deeds of conveyance, as may be necessary and proper, to vest in the purchaser or purchasers, all the right, title, interest, claim, and demand, of the debtor or defendant, which he had in and to such lands and tenements so sold, either in law or equity."

The terms *lands* and *tenements*, in the elementary books, are used to distinguish two of the several kinds of things real or real property. The term *lands and tenements of the defendant*, may properly be construed to mean, lands and tenements belonging to the defendant, or in which he had an estate or property. If these terms alone had been used in the statutes they would, perhaps, by a fair construction, be considered as subjecting to sale under execution any real estate of the defendant, or any legal interest which the defendant had in lands and tenements. This, however, would be the result of construction, for the statutes, independent of the 48th section, above quoted, do not in express terms refer to the estate or interest in lands and tenements which may be sold. In fact the term *of the defendant* would rather imply an absolute right, and not permit the sale of any less estate than one in fee simple. There would

be nothing, independent of that section, to show certainly that an estate for life, or other estate less than a fee, could be sold under execution.

These remarks are submitted to show the necessity of having recourse to the 48th section to determine what estate or interest in lands and tenements may be sold under execution at law, and that it must have been the intention of the legislature by that section to provide for that important point.

If, then, we are to look to the 48th section, to determine what estate or interest of the defendant may be sold under execution and vested in the purchaser, all doubt on the subject appears to be at an end. The legislature had the right to authorize the sale of an interest in equity, and it is clear that such an interest is embraced within the express words of that section of the statute. Nothing can be more explicit or stronger than the words used; the purchaser is to be vested with all the right, title, interest, claim and demand of the debtor or defendant, which he had in and to such lands and tenements so sold, either in law or equity. It is not necessary that the defendant should have the right and title to the lands, but his interest in them, his claim or demand to them may be sold, and that, too, whether it be in law or in equity.

Mr. Chief Justice SEARKEY delivered the opinion of the court.

Anderson filed this bill to set aside certain sales of land made under executions, because of inadequacy of price, and because as to part of the land he had but an equity under a bond for title, which was not the subject of sale under execution at law. The respondents were the purchasers, part of whom were also the judgment creditors, as well as the original vendors of part of the land.

It seems that Anderson, in the year 1836, with a view to speculation, purchased a large quantity of land from the New York and Mississippi Land Company, for which he contracted to pay \$31,000, one third in cash, and the balance in two equal instalments. He made the cash payment and executed two writings obligatory for the remainder, on one of which suit was

DeLafield et al. v. Anderson.

brought, and under the judgment the lands were sold, the plaintiffs in execution becoming the purchasers at very low prices. But land to which Anderson had a legal title was also sold and mostly purchased by the judgment creditors. From the company he had received only a bond to make title on payment of the purchase-money. The complainant avers that he was absent from the state at the time of sale, and had no knowledge of it.

The respondents demurred to the bill for multifariousness, and because it does not present a case which entitles the complainant to relief. There is but a single feature in the case which in any way gives countenance to the charge of multifariousness. There were three different sales, under as many different executions; one made by the sheriff of Chickasaw county; one by the sheriff of Monroe county, and as to the third it does not appear where it was made. The two first were made in 1843, and the judgment creditors were the only purchasers. The last was made in 1844, at which Isaac Mayfield purchased one quarter section of land for fifty dollars, and Mayfield and Canniway purchased another quarter section at fifty dollars. This was not part of the land which had been purchased by Anderson of the land company, and as nothing is said about the title, we must suppose it was a legal one. The point of interest is certainly remote as between Mayfield and Canniway and the other defendants. It would seem that the sale to one might be set aside without interfering with the sale to the other. Mayfield and Canniway had no interest whatever in the sale made to the land company; nor does the circumstance that they both derived title under the same judgment make any difference. The judgment is not questioned. But there is a point in which a joint interest is concentrated. The land company were the judgment creditors, and entitled to the money paid by Mayfield and Canniway. If the sale is rescinded, they must refund, and on that account they have such an interest in the sale made to Mayfield and Canniway as entitles them to insist upon its validity. It is true that if the sale should be rescinded, their lien may again attach on the land, but still they have a right to resist such a

Delafield et al. v. Anderson.

consequence, if they think proper. If the land did not bring its value, it would seem to be to their interest that the sale should be set aside, and yet they have a right to insist on holding the fund which they have received for it. It is plain, then, that they are properly joined with Mayfield and Canniway as parties, as a decree to rescind would effect them both. We conclude, then, that the bill was not multifarious in consequence of the improper joinder of parties.

As to the allegation of inadequacy of price it is entirely naked. It is not coupled with a charge of fraud or combination. It is not urged as amounting to evidence of fraud. It does not seem to come fully within the rule which has usually been adopted by courts of chancery in setting aside sales for inadequacy of price. If the merits of the bill rested on this allegation alone, the demurrer for want of equity might reach it; but it does not. It seems that a large quantity of the land sold was held by Anderson under no other title than a bond from the vendors to make title on payment of the purchase-money, only one third of which had been paid. He held therefore but an equity which was not the subject of sale under an execution at law. This question is fully covered by the decision in the case of *Goodwin v. Anderson et al.* 5 S. & M. 730, to which it is sufficient to refer. We think the respondents should have answered the bill, and therefore affirm the decree, and remand the cause.

A. McNUTT, Governor, &c., use of DAVID G. MOORE and ROBERT MOORE, vs. SAMUEL D. LIVINGSTON, WILLIAM L. BALFOUR, JAMES S. EWING, and WILLIAM GARTLEY.

The official duties of a clerk of the circuit court embrace every act that the law requires him to perform in virtue of his office ; the issuance therefore of a writ of error is an official act ; and so also is his taking bond with two or more sufficient sureties, upon the issuance of such writ.

The clerk of a circuit court is liable on his official bond for issuing a writ of error and a *supersedeas*, without taking from the defendant in the judgment, bond conditioned according to law, with two or more sufficient sureties ; in such case the bond may be sued on by any person injured, and a recovery had to the amount of the penalty thereof.

Whether the law makes the clerk of a circuit court guarantee the sufficiency of the sureties on a bond taken by him, upon the issuance of a writ of error and a *supersedeas* — *Quære ?*

The granting of a writ of error by the clerk of a circuit court in pursuance of the statute, How. & Hutch. 541, is a ministerial and not a judicial act.

By law the clerk of a circuit court may appoint deputies ; but the deputy is responsible to the clerk alone, and the clerk is liable to parties who may be injured by the acts of the deputy, as the acts of the deputy are the acts of the principal.

In an action against the clerk of a circuit court and his sureties on his official bond, for the failure of the clerk to take a bond with two or more sufficient sureties upon the issuance by him of a writ of error and a *supersedeas* ; it is no answer to the sufficiency of the declaration, to say, that the erroneous conclusion of the clerk in regard to the sufficiency of the sureties, is no breach of his bond ; nor, in deciding upon the sufficiency of the declaration, is the fact that the sheriff had made a sufficient levy, which was not discharged by the *supersedeas*, a proper subject of inquiry.

ERROR from the circuit court of Madison county ; Hon. John H. Rollins, judge.

This was an action of debt, brought by A. G. McNutt, governor, &c., for the use of David G. Moore, and Robert Moore, co-partners under the name and style of " D. G. & R. Moore,

McNutt v. Livingston and others.

against Samuel D. Livingston, clerk of the circuit court of Madison county, and William L. Balfour, James S. Erving and William Gartley, as sureties on his official bond. The declaration was founded on the official bond, and the clerk, after reciting the bond and the conditions thereunder written, one of which was that the clerk should faithfully perform the duties of his office, averred that the said Samuel D. Livingston did not faithfully perform the duties of his office, but that he failed to do so in this; that on the 15th day of February, 1839, the said D. G. & R. Moore, recovered a judgment in the circuit court of Madison county, against James Sims, Uriah Kent, Alfred Haley, and Enoch King, for \$6816, besides costs; and on the 29th day of April, 1839, said Livingston, as clerk, issued an execution thereupon, directed to the sheriff of Madison county, which was levied upon slaves, to the value of \$8000, the property of Enoch King, one of the defendants in said execution; and afterwards, to wit, on the 12th day of March, 1839, said defendants in said execution presented their petition to said Livingston, as clerk, praying a writ of error on said judgment to the high court of errors and appeals, in conformity with the statute in such case made and provided; which was granted by said Livingston, by his deputy, O. F. Pack; and at the same time said Livingston, by his said deputy, issued a writ of supersedeas, directed to said sheriff, directing and ordering said sheriff to supersede and desist from all further proceedings on said execution; that said supersedeas came to the said sheriff's hands, who thereupon discharged said slaves from said levy. That said Livingston, by his deputy, issued said writ of supersedeas without taking from said petitioners, (the defendants in said judgment) a bond with two or more good and sufficient sureties, approved by the clerk, and conditioned in the manner prescribed by law; but that through negligence omitted and failed to take such bond, as by law and the conditions of his official bond he was bound to do; by reason of which the plaintiff has entirely lost his debt.

To this declaration the defendants pleaded eight pleas.

1. That the plaintiff did not recover judgment in the Madison circuit court, as alleged in the declaration.

2. Nul tiel record.

3. That the issuing writs of error and supersedeas, and taking bond, does not constitute a part of the duties of clerk of the circuit court, and that in performing said acts, the clerks of the circuit court act as officers of the high court of errors and appeals, and not as clerks of the circuit courts.

4. That said Livingston, before issuing the supersedeas, did, by his deputy, take bond and security from the petitioners, &c.

5. Substantially the same as the 4th plea.

6. General performance of the conditions of the bond.

7. That the *feri facias* issued on the said judgment was void as to Enoch King, because he was not declared against in the action on which said judgment was rendered against him.

8. That the *capias* and all the proceedings subsequent thereto in said action, in which said judgment was rendered, were void, because said Enoch King was not a defendant declared against in said action, at or before the issuing said *capias*.

The plaintiff demurred to the 3d and 6th pleas, and replied to the 1st, 2d, 4th, 5th, 7th and 8th.

Upon the argument of the demurrers, the court extended the same back to the plaintiff's declaration, and sustained the demurrer as to the declaration. Judgment was thereupon rendered for the defendants; from which this writ of error is prosecuted.

A. H. Handy, for plaintiffs in error.

The only question for the court, in reviewing the judgment of the court below, is, was the plaintiffs' declaration sufficient in law to entitle him to recover?

It was contended, in the court below, that it was insufficient for the following reasons:

1. That the circuit clerk was not responsible by law for the sufficiency of the sureties on the writ of error bond; but that the plaintiffs' remedy, in case of insufficient sureties taken, was by application to this court, under the 50th sec. H. & H. 541. True, that statute provides that the plaintiff may except to the sureties before a judge of this court. But this is not the only

remedy he has, in case the clerk violates his duty in taking sureties on the bond. The supersedeas operates from the time the writ is issued, and if this were the only remedy in such case, the defendant might remove his property beyond reach of law before the matter could be acted on by a judge of this court. If this position be correct, the plaintiff could not make the clerk responsible, although he should designedly and corruptly take worthless security and cause the defendant's property to be released, whereby the plaintiff lost his debt. But it could never have been the intention of the legislature, in giving this additional means of protection to the plaintiff, not to hold the clerk to a faithful discharge of his duty in approving and taking the bond.

2. That it was incompetent for the legislature to confer the power of approving bonds and granting writs of error, because this involves judicial questions. It is not easy to perceive, how the taking and approving of sureties can be called a judicial act. It is a duty imposed by law on the clerk, for the palpable violation of which he becomes responsible on his bond; a duty which he can always perform in good faith, and be protected from the consequences of the errors of honest judgment. Much less can the issuance of the writ of error be called, a judicial act, because it is made the duty of the clerk to issue it, upon bond being given.

Under the old statute (H. & H. 538, sec. 39,) the allowance of the writ of error was a judicial act, by which the judge determined whether a party has shown sufficient cause in law to entitle him to the writ. This was essentially an act of judicial power. But it was the granting the writ which constituted the judicial act, not the taking bond and security, which was a mere incident to the act, and a means provided for the security of the plaintiff in consequence of this judicial act. But by the act of 1837, (H. & H. 541, sec. 50,) the clerk cannot refuse the writ of error, if good and sufficient bond is given. He is called on to perform no judicial act, that is, no act determining any legal question in litigation between the parties, or giving any remedy which he might refuse.

3. That if it was competent for the legislature to give this

power to the clerk, it could not be given to his deputy. If this was a duty required by law to be performed by the clerk, the deputy had full power and authority to perform it. H. & H. 484, sec. 16.

4. That in issuing writs of error, the circuit clerk performs a duty appertaining to the clerk of this court, and his bond therefore, as circuit clerk, is not responsible. But the statute plainly makes it the duty of "the clerk of the court where the judgment was rendered." Although the writ does command the same court from which it issues to send up the record, &c. (which is contended to be absurd) yet the law is so written, and the writ itself is mere matter of form.

5. That the issuance of the supersedeas did not authorize the sheriff to release the property taken in execution. But in the case of *Walker v. McDowell*, 4 S. & M. 118, the contrary of this was held to be the law, where the supersedeas issued after levy. In the present case it appears, by the declaration, that the writ of error and supersedeas were issued on the 12th March, 1839, and the execution was issued on the 29th April, 1839; and consequently there could have been no levy made when the supersedeas issued.

The averment of the declaration is, that Livingston issued the supersedeas without taking bond as prescribed by law. This was clearly a violation of his duty of clerk. If issued after levy, it was the means of causing the sheriff to discharge the property, and thereby the plaintiffs have lost their debt. If a sufficient bond had been taken, it would have been a security to the plaintiffs, notwithstanding the sheriff discharged the property. If issued before levy, it was still a violation of his duty, which required him to take a "bond with two or more good and sufficient sureties," &c.

Even if it be considered by the court, that the supersedeas did not justify the sheriff in releasing the property levied on, yet it is clear that the issuance of the supersedeas caused the release; that the supersedeas was issued without a sufficient bond, which was a violation of the duty of the clerk; that by this violation of duty the plaintiffs have lost their debt. They

are therefore entitled to recover against Livingston and his sureties on his bond for the injury sustained.

D. Mayes, for defendant in error.

The declaration shows no cause of action, and judgment was properly entered for the defendants.

1. The *granting* an appeal with supersedeas, is a *judicial act*, the *issuing* it a *ministerial act*. The circuit courts and chancery courts now grant appeals and approve security. A judge of the court of appeals may grant a supersedeas and approve security. At one time all orders for supersedeas issued from the judge who approved the security. By the common law the judge allowed it. Can an action be maintained against the chancellor, a judge of the court of appeals, circuit judge or probate judge, who approves security which may prove to be insufficient? Yet, if the act of granting the process and approving security is ministerial in the one case, it is so in the other.

Before this duty was transferred from the court to the clerk, the duty was in its nature the same that it now is. The changing the person who is to do a thing does not change the nature and character of the act to be done. If the judge was not liable for error, the clerk, being as to this matter substituted for the judge, can be under no responsibilities which the judge was not under. When the legislature transferred the duty to the clerk, he took it with the responsibilities that attached to that duty whilst it rested on him from whom he received it. The act of assembly *created no new duty or responsibility*, but merely transferred a pre-existing duty with its pre-existing responsibilities from one officer to another. The legislature so regarded it, as is manifest from the act itself. It gives the party a remedy in the nature of an appeal to a judge of the high court in vacation, and this is his only remedy. H. & H. 541, § 50.

2. If the deputy exceeds or acts beyond the scope of the deputed powers, the principal officer is not responsible. The hearing the evidence and deciding on the sufficiency of the bond is a judicial act, and cannot be performed by deputy. The act of creating a deputy does not delegate any but mere ministerial

duties. If the deputy exceeds the limits of his agency, as here Pack, the deputy clerk, did, he cannot render his principal liable, any more than he could do if he issued execution and levied it, and took an insufficient delivery bond, he could bind his principal to account for the insufficiency of such security. The approval of the bond is confided by the statute to the clerk, and from the nature of the act must be performed by him.

3. The declaration shows that before the supersedeas issued the sheriff had made a sufficient levy. It was then the duty of the sheriff to proceed to sell; if he restored the property it was his wrongful act, and he was responsible; the clerk was not. *Menton v. Stevens*, 3 Willis R. 271; *Lane et al. v. Bacchus*, 2 T. R. 45; *Blanchard v. Myers*, 9 Johns. R. 66; *Kenrick v. Whitford*, 17 Johns. R. 34; *Brisban & Braman v. Caines*, 11 Johns. R. 197; *Blount v. Greenwood*, 1 Cow. R. 21.

4. The condition of the clerk's bond is that he shall *faithfully discharge* the duties of his office. The erroneous conclusion of the clerk as to the sufficiency of the securities, is no breach of such a condition. He is not a guaranty of the sufficiency of the sureties. The breach in the declaration is assigned in negative, general terms, pregnant with the affirmative that the bond was taken, but the securities were not good and sufficient.

5. A writ of error, supersedeas, and citation are not process of the circuit court. They are all process of the high court of errors and appeals. The clerk in issuing them does not act as clerk of the circuit court, but being clerk of that court the statute requires him to discharge some of the duties of clerk of this court. His bond for the faithful discharge of the duties of the clerk of the circuit court, does not extend to those duties which he discharges as clerk of this court.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This action was brought on the official bond of the clerk of the circuit court of Madison county, for having improperly issued a writ of error and supersedeas on a judgment in favor of Moore, without requiring bond, with two sufficient sureties, as

by law he was bound to do. It is made the duty of the clerks of the circuit courts to issue such writs, as a matter of right, on the petition of any one who desires to have a judgment reviewed, to which he is a party, on the petitioner's giving bond with two or more sufficient sureties, to be approved of by the clerk. H. & H. 541, § 50.

The condition of the clerk's bond required "that he should faithfully perform the duties of his office," and the plaintiff, in assigning a breach, has averred that the defendant "did not faithfully perform the duties of his office, but that he failed to do so in this," &c. ; and after reciting the recovery of the judgment by Moore, the issuance of an execution thereon, a levy by the sheriff on slaves sufficient to pay the debt, the petition for writs of error and supersedeas, and the grant of the same by the clerk through his deputy, and the discharge of the levy by the sheriff in obedience thereto, it concludes by averring that the clerk issued said writs by his deputy, "without taking from the petitioners, the defendants in execution, a bond, with two or more good and sufficient sureties, approved by said clerk, conditioned in the manner prescribed by law, but through negligence omitted to take from said petitioners, the defendants in said execution, such bond and security, upon the issuance of said writ of supersedeas, as by law and the condition of said writing obligatory he as clerk as aforesaid was bound to do." It then proceeds to aver the loss of the debt as a consequence.

The defence was placed on various grounds, by eight special pleas, to six of which the plaintiff replied, and demurred to two, the third and the sixth. On argument of the demurrer, it was extended back by the court to the plaintiff's declaration, which was adjudged insufficient, and judgment rendered for the defendants. The objection to the declaration, as it has been argued here, is, that it does not contain good cause of action, and so it was probably considered by the court below, without regard to defects of form. The question then is narrowed down to this : Is the clerk of the circuit court liable on his bond, for issuing a writ of error and a supersedeas, without taking from the defendant in the judgment, bond conditioned according to law, with two or more sufficient sureties?

In the progress to a correct conclusion, the inquiry first to be made is, does the taking of such bond constitute part of his official duty. The law is express, that on petition for a writ of error, it shall be the duty of the clerk to issue it if the sureties be good. He has no discretion in the matter. By the condition of his bond he is bound to perform faithfully the duties of his office. The duties of his office we must understand to embrace every act that the law requires him to perform in virtue of that office. All such are covered by the condition of his bond. As it is his duty to issue a writ of error, it must be performed in the manner and on the terms prescribed by law. He must require bond with two or more sufficient sureties. That also is an official duty. The law gives the party against whom the writ of error is prayed, the bond as an indemnity, and it requires the clerk to see that the sureties are sufficient. He is to determine whether they are sufficient or not, and if he neglects this part of his duty, he must answer for it. We do not say that the law makes him guarantee the sufficiency of the sureties. If he should take bond and use a reasonable degree of caution in regard to the sufficiency of the sureties, he might probably be excused; that is not now the question, and we do not mean to decide it in advance. He is charged with a total neglect in the discharge of this duty, and for such we think an action may be sustained on his bond. The law is, that the bond may be put in suit by any person injured, and a recovery may be had to the amount of the penalty. H. & H. 481, § 5; Rev. Code, 103, § 10.

Several grounds have been taken in the argument against the liability of the clerk, which deserve some consideration. First, it is said, that the granting of a writ of error is a judicial act, which by the common law, and formerly by a statute of this state, was performed by a judge, and that by changing the officer who was to do the thing, the legislature did not change the character of the thing to be done. That as a judicial officer would not be liable, neither is the clerk, who being substituted for the judge, cannot be under greater responsibility. This argument seems to admit, that if the clerk acted as a ministerial

officer, he is liable, and we cannot think he acted in any other capacity. He had no judicial duty to perform. There is but a single point for him to determine, and that is a question of fact, not of law, to wit: are the sureties sufficient? No judicial discretion or judgment is to be exercised. As well might it be said that the sheriff acts as a judicial officer in taking a bail bond, or a forthcoming bond, and yet we know that these are always regarded as ministerial acts. See 2 Caines's R. 108; *Warne v. Varley*, 5 D. & E. 443. As this was a ministerial act, the clerk was liable for the act of his deputy. By law the clerks may appoint deputies, but the deputy is responsible to the clerk alone, and the principal is liable to parties who may be injured by the acts of the deputy. The acts of the deputy are the acts of the principal.

It was also insisted that the erroneous conclusion of the clerk in regard to the sufficiency of the sureties is no breach of the bond. If this were even so, it is not an answer to the sufficiency of the declaration. The breach is, that the defendant did not take bond with two sufficient sureties. It may turn out that no bond was taken. At all events, we do not feel warranted by the state of the pleadings in deciding the breach to be ambiguous.

As to the objection that the sheriff had made a sufficient levy which was not discharged by the supersedeas, that is not a proper inquiry in deciding on the sufficiency of the declaration.

The judgment must be reversed, and demurrer sustained to the pleas, and the cause remanded for further proceedings.

ALBERT G. ELLIS vs. JOHN R. WARD.

The interest of a party holding only a bond for title to land, the whole of the purchase-money not being paid, is not subject to sale under an execution at law.

Where a party holding a bond for title to land assigns it to another without any covenant on his part, and the same land is sold under an execution against the assignor of the bond in a controversy between the assignee of the bond and the purchaser at the sale under the execution, the assignor of the bond is an incompetent witness to prove that he assigned the bond without any consideration, and in fraud of his creditors.

McG. purchased of the board of police of the county of Ponola, a lot in the town of Ponola, and took a bond for title when the last instalment on the lot was paid; McG. sold the lot to W. and assigned him the title-bond, without any covenants on his part, W. contracting to pay the last instalment due by McG. to the board of police; E. under a judgment recovered by him against McG. after the assignment of the title-bond to W. had the lot sold by the sheriff, and bought it himself, having full notice of the assignment of the bond to W.; E. then procured the board of police, by their president, to execute direct to him a deed to the lot, and he paid them the last instalment due by McG., and which W. had assumed the payment of, the board of police having notice also of the assignment of the bond to W.; E. obtained possession of the lot, and put improvements upon it; W. filed a bill to have the deed to E. from the president of the board of police set aside and cancelled, and for a specific performance of his contract with the board of police: *Held*, that W. was entitled to the relief sought, but that E. had a lien on the lot for the instalment paid by him to the board of police, and that he should be allowed for his improvements, to be applied to the extinction of the rent, so far as they will go.

ERROR, from the district chancery court of Holly Springs;
Hon. Henry Dickinson, vice-chancellor.

John R. Ward filed a bill in the district chancery court at Holly Springs, against Albert G. Ellis, charging that on the 10th day of December, 1839, Joseph I. McGee purchased from

Ellis v. Ward.

the board of police of Ponola county, part of lot No. 10, in Block No. 7, in the town of Ponola, at the price of two hundred and eighty dollars, ten per cent. of which amount was paid in cash, and McGee's two notes for one hundred and twenty-six dollars each, payable at one and two years, were given for the balance, and the board of police executed to McGee a bond conditioned to make a title upon the payment of the purchase-money; that on the 2d day of October, 1840, McGee sold the lot, having made valuable improvements thereon, to complainant, and assigned to him the bond for title, in consideration of which complainant executed to McGee his note for five hundred dollars, payable four years after date, and agreed to pay the last instalment due by McGee to the board of police; that possession was given to complainant, and he permitted one Dr. Williams, who was then occupying the house, with the consent of McGee, to continue in possession of the premises, free of rent, that he might protect them, until complainant could meet with an opportunity of renting them; that when Dr. Williams vacated the house the defendant managed by artifice and trick to seize and take forcible and fraudulent possession of the house and lot, and has controlled the same ever since, renting them out and receiving the rents; that the defendant pretends to claim title to the house and lot, under a sheriff's deed, dated the 10th day of September, 1841; that the sheriff's deed was obtained by the defendant in the following manner, to wit: After McGee had removed to the state of Tennessee, the defendant set up a fraudulent claim against him, and upon that had an attachment issued, and levied on the house and lot purchased by complainant, as the property of McGee; that he recovered a judgment against McGee, and caused the sheriff to sell under the execution which issued thereon the house and lot, and bought them himself, for fifteen dollars; that on the day of the sheriff's sale, and before the sale took place, the defendant was publicly notified that McGee had no right, title, or interest, in the house and lot, that complainant had purchased them, and was then the holder of the title-bond; that at the time of suing out the attachment the defendant was in truth indebted to McGee, and McGee could have established

Ellis v. Ward.

the fact, had actual notice of the attachment been given to him, and he would have appeared. The bill further charges, that the defendant then applied to the board of police to get their deed to the lot also, urging upon them his purchase at the sheriff's sale, and the payment by him of the last instalment due by McGee, as reasons why they should make him a deed; and the board refused to make him a deed, upon the ground that they could not legally convey to any one but the original purchaser from them, or his lawful representative or assignee; and they continued so to refuse until, through the management and intrigue of the defendant, and his lawyer, employed expressly for the purpose, the board, on the 25th day of October, 1841, passed an order, authorizing the president of the board, in all cases, to make title, &c.; that the defendant and his counsel, having very great influence over the president of the board, prevailed on him to convey the house and lot to the defendant, on the 27th day of October, 1841, in direct fraud of the known rights of the complainant; that deed, on its face, recited the facts that it was made exclusively in consideration of the defendant's having purchased the property at sheriff's sale, and the payment by him of the last instalment due by McGee to the board. The bill charges that the note for the last instalment due by McGee had been transferred by the board long anterior to the purchase by defendant, at the sheriff's sale, to George W. Ragan, in payment of a debt due him by the county of Ponola, and although the board had in that manner received full satisfaction for the note, it had not then been paid by the defendant, as noted in the deed; that the board of police, at the time their president conveyed the house and lot to the defendant, had full notice of complainant's purchase, and the assignment of the bond to him by McGee; that the suing out of the attachment, and having it levied on the house and lot, the purchase by the defendant, at the sheriff's sale, and the execution of the deed by the president of the board of police, were all in fraud of the rights of complainant, who was a *bona fide* purchaser, for a valuable consideration, and all being done with notice of complainant's claims, did not divest him of

his right to demand of the board of police a conveyance of the lot according to their contract; that he had always been ready and willing, and was then ready and willing to pay the last instalment due by McGee to the board; and he had repeatedly demanded of them a title to the lot, and tendered them their title-bond for that purpose; but they continued to refuse to do so upon the ground that their former president had conveyed the same to the defendant, notwithstanding some of them were well satisfied that conveyance ought not to have been made, and was in direct violation and fraud of the rights of complainant. And all of them would be perfectly willing to comply with their bond, and make a title to complainant; but they thought it would not be proper to do so until the deed to the defendant was set aside and cancelled. Ellis and the board of police were made defendants, and the prayer was, that the deed from the president of the board of police to Ellis should be set aside and cancelled, and the board compelled to perform specifically their contract, and to make to complainant, as the assignee of McGee, a title in fee simple to the lot, and for general relief.

The several members of the board of police filed separate answers, all, except John Rayburn, stating that they had been elected since the sale to McGee, and the execution of the deed by the former president of the board to Ellis; and that they had no knowledge of those transactions, nor of any of the various allegations in the bill, save that the complainant had appeared before the board, and exhibited the title-bond made by the former board to McGee, and by McGee assigned to him, and demanded a title to the lot, in accordance with the conditions of the bond. And they refused to make the title as required, because the former president had conveyed the lot to their co-defendant Ellis, and they thought it would be improper in them to execute another conveyance until that to Ellis should be set aside or cancelled; that the county had no claim or lien on the lot, and they were willing to comply with the conditions of the bond, if the deed to Ellis should be cancelled. The answer of Rayburn stated the same in substance as the answers of the

Ellis v. Ward.

other members of the board, and stated, in addition, that he was a member of the board when the sale was made to McGee, upon the terms and in the manner charged in the bill; that after the sale respondent took no further note of it, until sometime in October, 1841. When the attorney of Ellis showed him a deed already prepared for the board of police to execute to Ellis to the lot, he informed the attorney he would not sign the deed, as he did not believe the board ought to sign any deed until the bond they had given to McGee was returned; and that Ellis did not hold the bond, and could not return it; he told the attorney, however, he could lay the deed before the board, and perhaps a majority of them might sign it; that the deed was laid before the board; but for some reason, not then recollected, the board did not sign it; but they passed an order authorizing the president of the board, in all cases, to make titles, &c. and that some time afterwards he saw a deed from the president of the board to Ellis, for the lot.

The answer of Ellis admitted that the board of police sold the lot to McGee in the manner and upon the terms charged in the bill, and also that he had notice of the assignment of the title bond by McGee to the complainant before his purchase at the sheriff's sale, but charges that the assignment was made when McGee was on the eve of leaving the state to avoid the payment of his debts; that McGee and Ward were near neighbors, intimate friends, and family connections, and the assignment was only colorable, made without any consideration whatever, and for no other purpose than to defraud respondent and other creditors of McGee; that after McGee absconded he sued out an attachment for a just debt which McGee owed him, and had it levied on the house and lot; that the attachment was defended by counsel for McGee, and he recovered judgment upon a full and fair trial; and under that he had the house and lot sold and bought them himself; he admitted that Dr. Williams was in the occupancy of the house at the time of the sale, but denies that he occupied it as the tenant of Ward; he was placed in possession by McGee, and knew no other landlord until the purchase by respondent; he denied that he obtained

Ellis v. Ward.

possession by intrigue or trick, or retained it by force or fraud; he admitted he was in the possession and received the rents, and insisted on his legal right to do so; he admitted that he applied to the board of police for a deed, and that he employed counsel to aid him in procuring a deed from them, and that the president of the board did make him a deed to the property on the day stated in the bill, but he positively denied that it was procured by fraud, collusion, or by undue influence over the president, or by any other improper or unfair means; that he was advised he was entitled to a deed from the board of police, and he wished it for the purpose of fortifying and strengthening his own title; that in order to procure the deed from them he made an arrangement with James C. Armstrong, who was then the holder of the note given by McGee for the last instalment of the purchase-money for the lot, by which the note was considered as settled and paid; that it remained in the possession of Armstrong after that time, through carelessness only; Armstrong was his neighbor, and he thought he could take up the note at any time; that although it remained with Armstrong, both parties looked upon it as in fact paid; that as soon as it was known he had settled that note the deed was made to him by the president of the board of police, without any hesitation. Respondent repeats that Ward never paid any consideration for the assignment of the title bond; that when respondent sued out an attachment against McGee, he had Ward summoned as garnishee, and Ward answered, denying that he owed McGee anything; he admitted the execution of the note for five hundred dollars, and pretended to hold offsets against it sufficient to cover the whole note. Respondent stated that since his purchase he has made permanent and valuable improvements on the property, for which he ought in any contingency to be allowed a fair price. He denied all the charges of fraud, collusion, &c. contained in the bill. The complainant proved by the deposition of W. H. Williams, that about the 2d day of October, 1840, deponent was in possession of the house in controversy, and he occupied it for some time thereafter; that he occupied the house by the permission of Joseph J. McGee; that

Ellis v. Ward.

he never heard Ward say anything about his having purchased the property of McGee until the day of the sheriff's sale; on that day, before the sale took place, he heard him say the property was his, and that he purchased it from McGee; from rumor he knew, prior to that time, that Ward had purchased it.

On cross-examination, he stated that he took possession of the house in October, 1840, and left it early in 1841; that previous to the sheriff's sale he never heard Ward say anything about the property; after that time he thought perhaps he had heard Ward say he owned it. James C. Armstrong's deposition, read by complainant, proved that the note for one hundred and twenty-six dollars, given by J. J. McGee to the board of police of Ponola county, and due on the 10th day of December, 1841, was not paid at the time or before the execution of the deed by the president of the board of police to Albert G. Ellis; being cross-examined, he said he objected to the president's making a deed to Ellis on the ground that the note was unpaid, and deponent was surety on it; that he was then the clerk of the police court, and the note was in his hands as clerk; that Ellis, in company with his attorney, went to him and promised to pay the note, and he then said he was satisfied; that Ellis did not say he would pay the note in any particular way; the note had been transferred to Ragan, to be returned if he could not collect it, and he returned it accordingly before the 27th day of October, 1841; that Ward had never offered to pay the note, though he always said he would pay it. The complainant proved, by J. T. M. Burbridge, that McGee sold the house and lot to Ward, and in consideration thereof, Ward gave McGee his note for five hundred dollars, and agreed in addition to take up a note executed by McGee to the board of police, but the amount or date of the note he did not recollect; that at the time of the sale McGee told Ward he could take possession of the house; that he considered the rent of the house and lot from September, 1841 till the 30th day of December, 1843, worth six dollars per month. On being cross-examined, he stated that the contract between McGee and Ward was made between eight and ten o'clock at night, and no one besides the parties was

Ellis v. Ward.

present except himself; after the sale by the sheriff, a brick chimney was built to the house by Ellis's order, as he understood; that while the chimney was being built, Ward went to the house, and objected to any improvements being made there by the order of Ellis; that he supposed the house would rent for four dollars per month without the brick chimney. By John H. Keith complainant proved that in April, 1843, deponent called on James C. Armstrong for two notes he held in favor of Ponola county, and he received not only the two notes asked for, but also a note on Joseph J. McGee for one hundred and twenty-six dollars, due on the 10th day of December, 1841; that he called on Ward for the payment of McGee's note, and Ward said he would pay it if the board of police would make him a title to the house and lot in controversy; that he then went to Ellis and told him he had the note, and Ellis appeared to be very much surprised, and said he thought it was paid, and went over to Armstrong's office to see him about it; he afterwards returned and requested deponent to hold on to the note until the 5th day of May and he would pay it, and he did pay the same to deponent, as treasurer of Ponola county. The defendant took the deposition of Joseph J. McGee, who testified that when he transferred the title bond to Ward it was agreed that the sale should be void; he received from Ward a note for five hundred dollars, which he still held but he was willing to give up whenever called on by Ward for it; that the sale to Ward was not *bona fide*, but was made for the purpose of preventing a sacrifice of his property; that he was not indebted to Ward at the time of the transfer of the bond and has not been since, and that Ward held no offsets against the note for five hundred dollars. The complainant's counsel excepted to the deposition of McGee upon the ground that the vendor would not be heard to impeach the title he conveyed to another, but the record does not show whether the exception was sustained or not.

At the January term, 1845, the vice-chancellor rendered a final decree, ordering the deeds from the sheriff and from the president of the board of police to be delivered up to be can-

Ellis v. Ward.

celled, and the board of police to execute to Ward a deed upon the payment by him of the amount of the note due by McGee on the 10th day of December, 1841, with interest; and that Ellis pay to Ward one hundred and sixty dollars for the rent of the property, that being the amount reported to be due by the commissioners to whom the case was referred to state an account. Whereupon Ellis appealed to this court.

D. C. Glenn, for appellant.

In this case there was a mere transfer of a title bond, and no covenant of warranty. Vendor of an estate, who has sold without covenant of warranty, is competent to prove title of vendee. 1 Str. 445. The peculiar attitude of a grantor is material only so far as it may affect his credibility. They can both prove and disprove fraud. A party to a transaction to which fraud is imputed, can testify either to the mala or bona fides of the same, the rule of interest being satisfied. 4 J. J. Marshall, 586, 587; Peeke's Ev. 146; 6 Johns. R. 136. In trover, A. v. B., C. allowed to prove property in himself. 4 Barn. & Ald.

In 9 Pickering's Mass. R. 141; action of replevin, plaintiff claimed under bill of sale from Abott; defendant claimed under a sale by virtue of an attachment. Upon the trial defendant introduced the vendor, and proved the sale fraudulent, and made with an intent to defraud creditors, (as McGee has done in this case,) but did not show whether the note was paid or not. The supreme court of Massachusetts decided him to be a competent witness.

McGee merely assigned this bond; he has given no special or general covenant of warranty, and from the above decisions he is clearly competent to testify as to this fraudulent affair, whatever may be said as to his credibility. He has no interest, or if any, equally balanced, and his position being that of a witness, he might prove any deed which he had attested to be a forgery. Burrow. 1255; 2 Dallas, 214; 2 Washing. 63.

D. Shelton, for appellee.

It is insisted by Ellis, that the sale from McGee to Ward was fraudulent and void.

There are two sufficient answers to this.

1st. There is no proof of such fraud.

2d. If proved, it would not be available to Ellis.

1. As to the proof of fraud. It is proven that McGee still holds Ward's note for five hundred dollars; that Ward has, from the time of his purchase, avowed and acknowledged his responsibility for the note still due the board of police. It is further proved (by Ellis,) that he garnisheed Ward as the debtor of McGee, and Ward, upon oath, answered that he did owe McGee the five hundred dollars, but had sets-off thereto to the full amount thereof. These things all tend to show the genuineness of the purchase, but the testimony of McGee himself, is taken by Ellis, and excepted to as incompetent; he deposes that he now holds Ward's note, which he is ready to redeliver to Ward; that there was an agreement between them that the sale should be void; that Ward has no sets-off against him.

McGee is incompetent to prove his own assignment fraudulent, because Ellis, having no pretence of claim to the property, since McGee had no interest subject to sale under execution. See *Goodwin v. Anderson*, 5 S. & M. 730; and *Moody v. Farr*, 6 S. & M. 100. If therefore the assignment to Ward be avoided, the title is in McGee. A grantor, who has executed a deed, is not a competent witness to prove it fraudulent, when by avoiding it the title would enure to his own benefit. 2 Johns. Rep. 478.

2. If proved it would not be available to Ellis.

In ejectment it is true, that a defendant can set up an outstanding title in avoidance of a recovery, but not so in equity; there it is a mere comparison of title. Ellis has no interest whatever. Ward may have interest, and the only conflict on that question is between him and McGee, and Ellis cannot set up McGee's title, and introduce McGee to prove it genuine, for in such case he would retain a wrongful possession in the

title of another, and sustain that title by the testimony of the holder thereof.

Miller and Smith, on the same side, cited, *Freeman's Ch. R.* 401; 1 *Wend.* 502; 2 *N. Y. Digest*, 993; 1 *Johns. Ch. R.* 52; 17 *Johns. R.* 351; 8 *Johns. R.* 333; 1 *Story's Eq.* 2d Ed. 499, note 3; *Ib.* sect. 439, 440, 442 and 695; 2 *Ib.* sect. 783, 784, 788, 796, p. 6, 7, 10 and 13.

Mr. Justice CLAYTON delivered the opinion of the court.

One of the points in this cause is settled by *Goodwin v. Anderson*, 5 S. & M. 730. The principal point now in controversy, grows out of a question, as to the competency of a witness. One McGee sold a house and lot in Ponola, to Ward, and assigned him a title bond which he held for it, without any covenant on his part. Ellis purchased the lot, under an execution in his own favor, at sheriff's sale. In a contest between him and Ward, the deposition of McGee was taken, by Ellis, to prove that the sale made by him to Ward was without consideration, and in fraud of his creditors.

It is urged, in argument, that McGee is competent as a witness, because he has made no warranty of title, and is not legally liable upon the assignment. This view is, to our minds, conclusive that he is not competent. It is his interest to pay the debt to Ellis, with the lot, and if he be not responsible to Ward, that interest is not countervailed by any opposing interest. There is no equipoise. This conclusion is fully sustained by several adjudged cases. *Pratt v. Stevens*, 16 *Pick.* 326; *Rea v. Smith*, 19 *Wend.* 293; *Waller v. Mills*, 3 *Dev.* 517. We do not understand the cases cited by the counsel for the plaintiff in error, to lay down a different rule; if they do, they constitute a departure from principle.

This was the view adopted by the court below. But we think the decree in other respects is erroneous. Ellis made the last payment for the lot, which, by his contract with McGee, Ward was to have paid; for this amount he ought to have a lien upon the lot. The improvements which Ellis placed upon

Ellis v. Ward.

the lot ought also to be allowed as a credit to him, to be applied to the extinction of the rent, so far as they go.

The decree will be reversed, and the cause remanded, with directions for the taking of a new account, upon the principles herein indicated. The decree, however, upon the main point, is not disturbed, the complainant being entitled to relief.

Decree reversed.

ISAAC R. WADE, JAMES P. PARKER, ELIAS OGDEN, and JOHN B. COLEMAN, Executors of Isaac Ross, deceased *vs.* AMERICAN COLONIZATION SOCIETY.

If trusts which arise under a will be of a character that require equitable interposition, the fact that they were created by a will cannot exclude the jurisdiction of equity.

If the probate court cannot grant full and adequate relief, in cases of trust arising under a will, the chancery court may take jurisdiction.

R., by his will, directed that after his decease his slaves should be called together, and such of them as elected to go to Africa, the provisions of the will being first fully explained to them, should be sent there under the directions and superintendence of the American Colonization Society; that such of his slaves as did not elect to go to Africa, together with all the residue of his estate, except a few slaves, particularly mentioned, should be sold and the proceeds after the payment of certain legacies, and all necessary expenses, be paid over to the American Colonization Society, to be appropriated first to paying the expenses of transporting his slaves to Africa, and secondly to their support and maintenance when there; the executors refused to sell any portion of the estate, or deliver the slaves to the American Colonization Society, as directed by the will, because, as they contended, the trusts created by the will were in violation [of the policy of this state, and in fraud of the statute on the subject of manumission, and therefore illegal and void, and the American Colonization Society filed a bill in the superior court of chancery against the executors, to compel the execution of the trusts and to carry out the provisions of the will; the executors resisted the bill on the further ground that it related to a matter purely of administration, and cognizable only in the probate court. *Held*, that the trusts created by the will were legal and valid; that the full measure of relief could only be attained in a court of equity, and therefore the court of chancery had jurisdiction.

Bequests made to slaves who are directed by the will to be transported to Africa and remain there, are not void for want of capacity in the legatees to take; the slaves have an inchoate right to freedom under the will, which is complete as soon as they are removed out of this state.

Where a will directs that the slaves of the testator shall be transported to Africa, under the direction and superintendence of the American Coloni-

zation Society, and that the executors should sell certain portions of the estate and pay over the proceeds to the Colonization Society, to be used by them in paying the expenses of transporting the slaves to Africa, and for their support and maintenance when there; the trusts are not void for want of capacity in the American Colonization Society to take for such purposes.

The American Colonization Society filed a bill against the executors of R., alleging that R., by his last will, directed his slaves to be sent to Africa under the superintendence and direction of complainants, and that the executors should sell certain portions of his estate and pay over the proceeds to complainants, provided they would agree to appropriate the same to paying the expenses of transporting the slaves to Africa and supporting and maintaining them when there; that the complainants were duly and legally incorporated; that they were willing to accept and appropriate the funds, as provided for in the will, the object of the Society, by their charter, being in accordance with the provisions of the will and in furtherance thereof; that by the decisions of the courts the will and provisions were fully established, and the rights of complainants to the slaves and estate, in trust as bequeathed in the will, and for the purposes therein contained, were fully confirmed, &c. The executors demurred to the bill, because there was no averment that the complainants were an incorporated society at the time of the testator's death, and because the complainants had no power or authority, under their charter, to take for the purposes and objects mentioned in the will; the chancellor disallowed the demurrer: *Held*, that the demurrer was properly disallowed.

It is only where the bequest or devise is too vague or indefinite for those intended to be benefited to claim any interest under them, that the doctrine as to charities arises: definite charities are trusts, which equity will execute by virtue of its ordinary jurisdiction.

Whether the Statute 43 Elizabeth is in force in this state; and whether the court of chancery has any jurisdiction over charities, to compel their performance, apart from and independent of that statute, — *Quære?*

Where a testator directs in his will that his slaves shall be transported to Africa, under the superintendence of the American Colonization Society, and that the executors shall sell certain portions of the estate and pay over the proceeds to the society, to be applied by them to the payment of expenses incurred in transporting the slaves to Africa, and supporting them when there, both the executors and the society are constituted trustees; it is the duty of the executors to deliver the slaves to the society for the purposes of the will; and it is the duty of the society to carry out those purposes; and if the executors will not discharge their duty, and interpose obstacles to the execution of the trust by the society, clearly a court of equity may enforce the performance.

Wade et al. v. American Colonization Society.

Whether, if a testator in his will directs that his slaves shall be sent to Africa, and the will constitutes no trustee to take them, any remedy exists to the slaves, — *Quære?*

The American Colonization Society is not prohibited by its charter from transporting slaves directed by a will to be sent to Africa under the superintendence of the society.

If an incorporation be appointed a trustee to execute trusts arising under a will, which are in themselves valid in point of law, neither the heirs of the testator nor any other private person, can inquire into or contest the right of the corporation; that could only be done by the state which granted the charter.

By the will of R. his slaves were directed to be transported to Africa, under the direction and superintendence of the American Colonization Society; the provisions of the will were declared valid by the judgment of the high court of errors and appeals, and the slaves declared entitled to an inchoate right of freedom, which would be perfect by their removal from the state; the legislature subsequently, in 1842, passed an act giving twelve months for the removal of slaves heretofore liberated, and declaring the bequest of freedom void if they be not so removed; one of the executors of R. detained the slaves in this state against their will, and against the will of the society and of his co-executors, 'until the twelve months, allowed by the act of 1842, expired; before the twelve months however had expired, the society, after using every means in its power to comply with the requisitions of the act, without suit, filed a bill to compel the executors to execute the trusts created by the will: *Held*, that the acts of the executor constituted such a fraud, that neither he nor any one claiming by virtue of his acts acquired any right; that the fraud of the executor placed him beyond the pale of the act of 1842, and that act did not therefore apply to the case.

Whether the act of 1842, giving twelve months from and after its passage for the removal of slaves *theretofore* liberated, or directed by any last will and testament to be sent beyond the limits of this state, and declaring all such bequests of freedom void, if the slaves be not so removed, is valid and constitutional, as to cases arising under will, duly proved and admitted to record before its passage, — *Quære?*

APPEAL from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

On the 19th day of November, 1842, the American Colonization Society, filed a bill in the superior court of chancery, against Isaac R. Wade, James P. Parker, Elias Ogden, and John B. Coleman, executors of Isaac Ross, deceased, alleging that complainants were duly and legally incorporated, and lo-

cated in Washington city, and in the state of Maryland; that the late Captain Isaac Ross, who resided in Jefferson county, in the state of Mississippi, at the time of his death, on or about the 26th day of August, 1834, made his last will and testament in writing, and at subsequent periods made and executed several codicils thereto on the days they respectively bear date; which will and codicils are in the following words and figures, to wit:

“In the name of God; *Amen*: I, Isaac Ross, of the county of Jefferson, and state of Mississippi, being of sound mind and disposing memory, do make this my last will and testament, hereby revoking all and every other will or wills by me heretofore made. In the first place I give and commend my soul to that merciful Being who formed it, and my body to the earth, to be decently interred at the discretion of, and in such manner and form, as my executors hereinafter to be named, may deem fit and advisable.

“In the second place, I give and bequeath to my grand-daughter, Adelaide Wade, the sum of ten thousand dollars, to be paid her within twelve months after my decease; I also give and bequeath to my said grand-daughter, Adelaide Wade, my negro woman cook, named Grace, and all her children living at the time of my decease, unless the said negro woman Grace should elect, of her own free will and accord, to go to Africa, as hereinafter provided, in which event she and her children to be transported thither upon the same footing with my other slaves. I also will and desire that my grand-daughter Adelaide Wade, shall take charge of and maintain comfortably during the remainder of their lives, my negro man Hannibal and his three sisters, viz.: Daphne, Dinah and Rebecca; and I give and bequeath to Hannibal the sum of one hundred dollars annually, during the remainder of his life, and to his above-mentioned sisters, Daphne, Dinah and Rebecca the sum of fifty dollars each, to be paid them annually by my executors, on the first day of January in each year; and it is further my will and desire that if the said Hannibal and his three sisters Daphne, Di-

nah and Rebecca, should elect to go to Africa, in preference to remaining under the care of my grand-daughter, Adelaide Wade, they shall be permitted to do so, and shall be sent upon the same footing with my other slaves, with this express understanding, however, (which is to be fully explained to them by my executors) that if they do elect to go to Africa, the legacies above bequeathed to them are to be null and void. In the third place I will and desire that my slave Enoch and his wife Merilla and her children be, within twelve months after my decease, conveyed to such free state as Enoch may elect, free of expense to them, and that the said Enoch and his wife Merilla and her children be then and there legally manumitted, and the sum of five hundred silver dollars paid to him, the said Enoch, at the time of manumitting him. It is further my will and desire, that if the said Enoch should elect to go to Africa, he with his wife Merilla and her children, shall be sent there upon the same footing with my other slaves; and that the above-mentioned sum of five hundred silver dollars be paid him by my executors at the time of his departure.

"In the fourth place, it is my will and desire, that should a crop be planted (or about to be planted) at the time of my decease, such crop shall be worked out, gathered and sold, and within ten days after the complete finishing of the crop, or if at the time of my decease the crop shall have just been gathered and completed, then within ten days thereafter, all my slaves of the ages of twenty-one years and upwards, except Grace and her children, Hannibal, Daphne, Dinah, Rebecca, Enoch and Merilla and her children, be called together by my executors, and the provisions of this will then and there explained to them, and the question put to them, whether they will go to Africa upon the terms hereinafter specified. If a majority of the whole number thus called together, of the ages of twenty-one years and upwards, shall elect to go to Africa, then it is my will and desire, that *all* of those thus called together, and all my other slaves excepting always Grace and her children, Hannibal, Dinah, Daphne, Rebecca, Enoch, Merilla and her children, shall be sent to Africa, under the directions and superintendence of

the American Colonization Society. And it is my will and desire, then and in that event, that the entire balance of my estate, both real, personal and mixed, excepting always Grace and her children, Hannibal, Daphne, Dinah, Rebecca, Enoch and Merilla and her children, be exposed to sale at public auction, one month's public notice being first given thereof, in the papers printed at Port Gibson and Natchez, and the same sold on the following terms, to wit: one-half of the purchase-money to be paid in cash, and the other half in twelve months from the day of sale, bond and unexceptionable security to be required of the purchasers, and to be judged of by my executors. It is further my will and desire, that the proceeds of the sale, together with any money that may be on hand at the time of my decease, and any that may be owing to me, after deducting the amounts necessary for the payment of the legacies herein bequeathed, and all necessary expenses that may be incurred, be paid over to the American Colonization Society, provided they will agree to appropriate it in the following manner, to wit: First, to pay the expense of transporting my slaves to Africa; and secondly, to expend the remainder for the support and maintenance of said slaves, when there, the same to be done in such manner as the society in their discretion, may deem most to the interest and welfare of said slaves.

"If, however, upon my slaves being called together by my executors, in manner and form as above directed, a majority of the whole number of the ages of twenty-one years and upwards, always excepting Grace and her children, Hannibal, Daphne, Dinah, Rebecca, Enoch, and Merilla and her children, should refuse to go to Africa, then it is my will and desire, that all of my slaves, always excepting Grace and her children, Hannibal, Dinah, Daphne, Rebecca, Enoch, and Merilla, his wife, and her children, shall be exposed to sale at public auction, at the same time, in the same manner, upon the same terms, and subject to the same regulations with the remainder of my estate as hereinbefore provided, with this understanding, that they be sold in such lots as my executors may deem best calculated to bring the highest prices, and with this further and most express understanding that the families are not to be separated.

"Then and in this event it is my will and desire that the proceeds of such sale, together with any money that may be on hand at the time of my decease, and any that may be owing to me, after deducting the sums that may be required to pay all the legacies herein bequeathed, and all other necessary expenses, be paid over by the executors to the American Colonization Society, upon the condition that they form a fund of it, or vest it in such manner as to bring in not less than six per cent. interest per annum, which interest is to be applied by them to the establishment and support of one single seminary or institution of learning in Liberia. And it is further my will and desire that said fund shall be continued and kept at interest, and the interest appropriated as above for the benefit of said seminary, for the term of one hundred years after my decease, at the expiration of which time I desire that all that remains may be given up to any government that may be in existence at the time in Liberia, to be appropriated by them in the same manner to the support and continuance of the same institution. But if at that time, there should be no government in Liberia, then it is my will and desire that the same be given up to the government of the state of Mississippi, to be by them appropriated to the establishment or support of some one institution of learning within the state, which they in their discretion may select.

"To carry the above provisions and bequests into full and entire effect, I do hereby nominate and constitute, Daniel Vertner, James P. Parker, Dr. Elias Ogden, now of Natchez, Isaac Ross Wade, and John B. Coleman, executors of this my last will and testament.

"In witness whereof I have hereunto set my hand and affixed my seal, this 26th day of August, 1834. ISAAC ROSS.

"Signed, sealed and acknowledged, in presence of us,

"JOHN BLOLEMAN.

"PETER C. CHAMBLISS.

"By way of codicil to my will and testament and in addition to the matters and things therein contained, it is my will and

desire,—First: That forty feet square of the land appropriated by me for my family burying ground be reserved from sale and held in trust by my executors and their successors forever. Second: That whereas I have left it optional with my negro woman Grace, and her children, to go to Africa, with my other slaves; now if the said Grace shall elect to go to Africa with her children, it is my will and desire that the sum of two thousand dollars be paid by my executors, to my grand-daughter Adelaide Wade, in addition to the sum of ten thousand, already bequeathed to her. Third: I give and bequeath to my grandson, Isaac Ross Wade, my secretary and book-case, and all my books of every kind and description. Fourth: It is my will and desire that no security is to be required from my executors, Daniel Vertner, James P. Parker, Dr. Elias Ogden, Isaac Ross Wade, and John B. Coleman.

"In witness whereof I have hereunto set my hand and affixed my seal, this 17th day of October, 1834. ISAAC ROSS.

"Signed, sealed and acknowledged in presence of us,

"SARAH WILSON.

"OLIVIA M. SKINNER.

"B. C. COOK.

"By way of further codicil to my last will and testament, it is my desire, upon mature reflection, to alter some of the provisions therein. First in relation to that part of my will which provides for taking the voice of my negroes, in relation to their going to Africa, or remaining here and being sold. I now desire that those who wish to go to Africa, be allowed the privilege of doing so, upon the terms and conditions heretofore provided, and those who elect to remain, be suffered to remain and be sold as previously directed, and the proceeds of their sale applied under the provisions of the will, for the benefit of those who elect to go to Africa.

"It is further my will and desire that the privilege of electing to go to Africa, be withheld from Tom, William, Joe, Alik, and Henrietta, being the negroes I bought from Franklin in 1833 and 1834; and from Jeffrey, the son of Harry, and that they

Wade et al. v. American Colonization Society.

be sold by my executors, in manner and form as provided in the previous part of my will, and the proceeds of their sale appropriated as therein directed.

"It is further my will and desire that if Hannibal elect to go to Africa, instead of the provision heretofore made for him, in that event he shall be paid, at the time he starts, the sum of five hundred silver dollars. And it is also my will and desire that if my man Dunke elects to go to Africa, he shall also receive, at the time of his departure, the sum of five hundred dollars. In witness whereof I have hereunto set my hand and affixed my seal this 24th day of February, 1835.

"ISAAC ROSS.

"Signed and sealed in the presence of us,

"B. C. COOK.

"JOHN B. COLEMAN.

"By way of further codicil to my last will and testatment, it is my will and desire that my daughter, Margaret A. Reed, have the uncontrolled use (and occupation) of my house, wherein I now reside, with all the offices and buildings appertaining to it and all the land attached to it, which may be necessary for her comfortable enjoyment of it, as a dwelling, together with all the furniture of every kind and description in or attached to it, and likewise all the yard and house servants, for and during the term of her natural life, or until she shall think proper and desire to relinquish the possession thereof; and it is further my will and desire, that the sale of my estate, as directed in a previous portion of my will, be postponed until after the death or relinquishment of possession by my said daughter, Margaret A. Reed, and the plantation be cultivated under the direction of my executors, and the proceeds of the crops, received by them, to be ultimately applied, as heretofore directed in my will.

"In witness whereof, I have hereto set my hand, and affixed my seal, this 16th day of March, 1835.

"Signed and sealed, in presence of us,

"SARAH R. WOODWARD,

"JOHN B. COLEMAN,

"WALTER WADE."

"By way of further codicil to this my last will and testament, I do hereby revoke, and declare null and void, that portion of my will relating to my man slave, Enoch and his wife, Merilla, and her children. And I do now will that my said man slave, Enoch, be absolutely sold, without the privilege of choosing between going to Liberia and being sold here, and the legacy bequeathed to him in the previous part of my will, is entirely revoked. I do likewise will that Merilla and her children be put upon the same footing with my other negroes, and allowed a choice between going to Liberia, or remaining here and being sold, as directed in the previous portions of my will.

"In witness whereof, I have hereunto set my hand and affixed my seal, this 17th day of June, 1835. ISAAC ROSS.

"Signed and sealed, in presence of us, JOHN B. COLEMAN.

"ISAAC R. WADE."

Complainants aver that Ross died about the 19th day of January, 1837; that his will and the codicils annexed thereto were duly proved and admitted to record in the probate court of Jefferson county; that letters testamentary were granted to James P. Parker, Elias Ogden, Isaac Ross Wade, and John B. Coleman, and they were duly qualified as executors, without giving any security for the discharge of their duties. Daniel Vertner never qualified or pretended to act as executor. Complainants charge that the executors, having qualified, took immediate possession of the real and personal estate of Ross under the will, which consisted of a large and highly improved plantation containing about five thousand acres, on which Ross resided, in Jefferson county, and a tract of land in Claiborne, and negroes and other personal property, contained in an inventory thereof, returned to the probate by the executors and sworn to by Isaac R. Wade, which inventory was filed as an exhibit to the bill, and shows that there were about one hundred and sixty negroes and other personal property, the whole being appraised at \$103,665; that shortly after the grant of letters testamentary, Parker, Coleman and Wade met and agreed between themselves that Wade should superintend the plantation and negroes be-

longing to the estate, make the crop, purchase the supplies, &c., and for his services they agreed that he should be allowed the sum of fifteen hundred dollars per annum, if the probate court should approve of the same, and the business of the estate was accordingly conducted by Wade, the executors meeting occasionally, and directing Wade how the business should be carried on. Complainants charge that Ross, at the time of his death, owed very few debts, and they only of a small amount, all of which had long since been paid; that the pecuniary legacies mentioned in the will had also been paid, and no legal or equitable obstacle had existed for two years to prevent the execution of the trusts of the will, in which complainants are interested, in the manner provided in the will; that complainants have always been ready and willing to accept and appropriate faithfully the proceeds of the real and personal estate as provided for in the will; the object of the society by their charter being in accordance with the provisions of the will, and in furtherance thereof. Complainants aver that Margaret A Reed departed this life several years ago, and that the slaves entitled to the choice of being sent to Africa under the will, desire to be sent there, and have always so desired to be sent, and complainants have ever been willing to take charge of them for that purpose, in fulfilment of the trust devolved upon them by the will. Complainants further aver that not long after the death of Ross, Jane B. Ross and others filed their bill in the superior court of chancery against the executors, to restrain them from the removal of the slaves under the direction and superintendence of complainants, to Africa, and to set aside the provisions of the will for such removal and the trusts devolved by the will upon complainants, they claiming the estate as heirs and distributees of Isaac Ross; that the executors demurred to that bill, and by agreement of the counsel of the respective parties it was decreed that the bill be dismissed upon the merits, and on an appeal therefrom by Jane B. Ross and others, the decree of the superior court of chancery was in all respects affirmed by the high court of errors and appeals; by which decisions the will and its provisions were fully established and the rights

of complainants to the slaves and the proceeds of the estate, after the payment of the debts and the pecuniary legacies, in trust as bequeathed in the will and for the purposes therein contained were fully confirmed; and the rights of all persons claiming or pretending to claim any right or interest in the estate were finally settled and adjudicated. And the records of the proceedings in both courts were made exhibits to the bill.* Complainants further aver that Isaac R. Wade, having obtained possession of the lands, slaves, and other property belonging to the estate under the agreement with the other executors above-mentioned, refuses to allow or permit Parker, Ogden and Coleman, or either of them, to have any control or management of any part of the estate; that Wade refuses to execute, and refuses to permit or allow his co-defendants to carry out the provisions of the will, and to execute the trusts devolved and sacredly enjoined on the executors and on complainants in the removal of the slaves of the estate (with the exceptions expressed in the will) to Africa, and the sale of the real and personal estate mentioned in the will, and the payment of the balance of the proceeds thereof to complainants for the purposes particularly set forth in the will; that Wade, instead of executing the benevolent intention of the testator, and joining or co-operating with his co-defendants to perform the trusts accepted by them to be performed in undertaking the execution of the will, holds the plantation, slaves, and other personal property in his own exclusive possession, and had converted the same to his own exclusive use and private gain, raising crops of cotton and other products of the plantation with the work and labor of the slaves, alike regardless of his own duties as a trustee in the premises, and of the objects and bequests of the will; that the defendants would not deliver up the slaves to be sent to Africa under the directions of complainants, although they had been informed and were fully aware that complainants were willing and had ever been ready and anxious to take charge of the slaves to be sent to Africa, and to secure the residue of the

* See a report of the case in 5 Howard, 305.

estate to which they were entitled under the provisions of the will and upon the conditions therein expressed ; that they had at different times sent an agent to Mississippi to make known their wishes upon the subject to the executors, and to take charge of the slaves, and they then had an agent residing in Adams county, who was fully authorized at any time to take charge of the slaves to be sent to Africa, and to secure the proceeds of the residue of the estate upon the terms provided in the will. Complainants further aver that on the 26th day of February, 1842, the legislature of the state of Mississippi passed an act which, among other provisions enacted, that "in all cases of wills heretofore made and admitted to probate within this state, whereby any slaves have been directed to be removed from this state for the purposes of emancipation elsewhere, or whereby any slave or slaves have been devised or bequeathed in secret trust for such purpose, unless such slaves shall be removed from this state within one year after the passage of this act, it shall not be lawful for the executor or executors of such last will and testament, or the person or persons having possession of such slave or slaves under the provisions of such will, so to remove such slave or slaves ; but the same shall descend to and be distributed amongst the heirs at law of the testator, or be otherwise disposed of according to law, in the same manner as if such testator had died intestate: *Provided, however,* that if such executor or other person having such possession, shall be prevented or restrained within the said time of one year from such removal by injunction or other legal process, or otherwise, the time during which such restraint shall continue or exist, shall not be taken or computed at any part of the said time of one year." Complainants charge that the mother of Isaac R. Wade is an heir and distributee of Isaac Ross ; and in the event of the defeat of the objects of the will, would be entitled to a large portion of the estate ; that Isaac R. Wade will endeavor to retain possession and continue the slaves in bondage under the act of 1842, unless the chancery court should interpose and prevent the same ; and until compelled by due course of law, he would continue to use the estate for his own

private use and gain, instead of executing the trusts devolved upon him, and delivering over the slaves to be removed to Africa, according to the wishes of the testator, who was the grandfather of Wade, and whose dying wishes and injunctions regarding the removal of the slaves, were by him fully made known to and impressed upon Wade; that Wade was insolvent and wholly irresponsible as to pecuniary compensation or damages for his violations of his duties, and of the provisions of the will, and that the object of the will would be defeated, and the estate wasted, unless Wade was compelled to unite with his co-defendants, and they are ordered and decreed to carry out in good faith the wishes of the testator, and execute the trusts, by delivering to complainants the slaves to be sent to Africa, and by disposing of the residue of the estate, and paying over the proceeds thereof, as provided for in the will, and also by paying to complainants all other moneys belonging to the estate; that Wade, in the summer of 1840, had converted about twelve thousand dollars, belonging to the estate, to his own use, and the crops of cotton raised in the years 1840 and 1841, amounting to about seven hundred bales each year, had not been accounted for, nor the proceeds paid over according to the provisions of the will. Complainants further aver that Wade will continue to use and abuse the trust estate, and entirely defeat the objects of the testator, unless the plantation and slaves and the whole of the estate were taken out of his possession and management, by the order and decree of the court, and placed under the control and management of a receiver, to be appointed by the court, or in the exclusive charge of Parker, Coleman and Ogden, to execute the objects and trusts of the will.

The bill prayed for an injunction, the appointment of receiver, and that the court compel a full and complete performance and execution of the trusts created by the will. On the 22d day of November, 1842, an injunction was granted by Hon. Robert H. Buckner, according to the prayer of the bill. The defendants, Parker, Coleman and Ogden, answered, admitting nearly all of the material allegations of the bill, but denying that they were liable, or in any way responsible for any of the

acts of Wade, which were not strictly in accordance with the provisions; they deny that they ever directly or indirectly assented to any of his acts, which were not clearly authorized by the will; they aver that Wade has had the exclusive control and management of the estate, claiming to be the sole executor, because they had never returned an inventory of the personal estate belonging to Isaac Ross. Defendants, Parker and Ogden, stated that they were fully satisfied, from conversations with the slaves, that they were all anxious to be sent to Africa. Respondents admitted that persons representing themselves as agents of complainants, had called upon, and conversed with them, relative to the situation of the estate; but they denied that any demand had ever been made upon them for the possession of the slaves and other estate, either by the complainants or their agents; they admitted, however, that had such demand been made, it would have been out of their power to comply with it, from the fact that they were out of possession, and were not permitted to exercise any authority or control whatever over the estate or any part of it; they averred their entire willingness and readiness to carry out to the fullest extent all the provisions of the will of their testator, whenever it shall be legally decided that they were entitled to the control and possession of the personal estate. The defendant, Isaac R. Wade, demurred to the bill. The chancellor disallowed the demurrer, and appointed a receiver to take charge of the estate, &c. from which Wade prayed an appeal to this court.

H. T. Ellett, for appellant.

1. The chancery court has no jurisdiction, the case being exclusively cognizable in the probate court. 2 How. 822; *Ib.* 856; 3 *Ib.* 252, 258; 4 *Ib.* 458; 7 *Ib.* 143, 162, 201, 316; *Freeman*, 501.

It is not denied that a technical trust, devolved on the executor by a will, apart from his general duties as executor in the administration of the estate, is cognizable in equity.

Every executor is a trustee, and all his duties are trusts, but such of his trusts as relate peculiarly to the administration of the estate, are exclusively cognizable in the probate court.

There is no technical trust devolved on the executors of J. Ross, their duties are the ordinary duties of an executor. The Colonization Society is the trustee and legatee, and the case is the common one of a suit by a legatee against the executor to recover property bequeathed to them to hold in trust for certain purposes. There has been no settlement of the estate in the probate court, and no order of distribution, no allowance of the executor's compensation, and no attempt to procure these, but the bill is filed to have an account settled here, and for a decree of distribution in this court.

The petition of Mrs. Ross for distribution is surely a probate proceeding, and cannot be enjoined in chancery. She proceeds in the probate court as heir, the Colonization Society claim the same property in chancery. Both suits are against the executors. What right has the Colonization Society to restrain Mrs. Ross from suing the executors? The executors might compel the two conflicting claimants to interplead, but certainly one claimant cannot enjoin the other.

2. That the devise of the will, being in trust for the negro slaves, neither the slaves nor a trustee can take for them.

Heirs are favorites of courts of justice, artificial reasoning will be allowed to prevent them from being disinherited. 1 Black. Com. 450, note; 2 Ves. sen. 164; Ib. 389; 1 Atk. 339; 3 Ib. 747, 387; Chit. Law of Desc. 311.

Slaves cannot take property by devise, nor can it be held in trust for them. 2 How. 837; 7 Monr. 645; 4 Dess. 266; 2 Car. Law. Rep. 557; 1 Tay. 209; Am. Dig. 479, 480, 481, 538.

A devise to a person incapable of taking is void. 2 Fonbl. Eq. 348; 6 Ves. jr. 52, 64; 2 Rob. on Wills, 30.

Ross et al. v. Vertner et al., 5 How. 356, merely decides that the will is not unlawful, and that the executors will not be restrained from executing it.

It was tacitly conceded by the counsel in that case for the will, (352) and by the chancellor, in Freeman, 603, that no suit could be maintained by the negroes or their trustee, but they contended that the executors ought to be let alone.

The trust, though lawful, is yet discretionary in the trustee.

2 S. & M. 30; 4 Wheat. 33, 34, 35. 2 Hill's S. C. Rep. admits the principle for which we contend, that neither the slaves, nor any person for them, can sue. That case, however, holds that on a bill filed by heirs against the executors for a partition, the court can decree an execution of the will by the executors. This part of the case is not law, it is a palpable absurdity. But if law, it does not affect this case. The confidence reposed in the executor is only guaranty of the execution of the will.

2. The bill alleges that the society "are duly and legally incorporated," &c. but does not show that they were so at the death of captain Ross. This is essential to their right to maintain this suit, for unless they were incorporated at the death of Ross the devises could not vest at all. 4 Wheat. 1; 3 Pet. 497; 2 Story's Eq. (3d ed.) 496, § 1146; *Paulet v. Clark*, 9 Cranch, 330; 3 Cond. R. 417.

Our statute providing that a plea to the action admits the parties, and the character of the parties suing is relied on in answer to this point. How. & Hutch. 595, § 32, 33.

This is no answer; we do not deny the parties, or the character of the parties. We admit the averments of the bill, that at the time of filing the bill the society was a corporation, duly and legally incorporated; but we deny that they show any right of action in the character they assume.

4. If the devise is void at law, can the chancellor sustain it as a charity, under his general jurisdiction at common law, or by virtue of the 43 Eliz. chap. 4?

That the jurisdiction of the chancellor is not to be referred to his general jurisdiction in equity, but sprung up after the 43 Eliz., and is mainly founded upon it. 2 Story's Eq. 510, § 1162; 4 Wheat. 1; 3 Pet. 382; 3 Leigh, 450; 4 Ib. 327; 5 Harr. & Johns. 392. Story reviews all the English cases. See also *Attorney General v. Bowyer*, 3 Ves. 726; *Morice v. Bishop of Dublin*, 9 Ib. 405.

That the 43 Eliz. is not in force in this country, unless re-enacted. See the above cases. 4 Wheat.; 3 Pet.; 3 Leigh; 5 Harr. & Johns.; 9 Cow. 481.

In some of the states it is held to be in force as a part of their

systems, by virtue of their peculiar laws. 12 Mass. 537; 16 Pick. 107; 18 Ib. 328; 4 Dana 357; 7 Ver. 241. In *Griffin v. Graham*, 1 Hawks, 96, it was held to be in force in North Carolina, but subsequent cases show that it is no longer the case. *Overton v. Overton*, 4 Dev. & Bat. Eq. 497; *Holland v. Peck*, 2 Ired. 215.

In Mississippi the 43 Eliz. is not in force, for it has been expressly repealed. The act of the territorial legislature of Feb. 10, 1807, (Toul. Dig. 19) furnishes a list of all the laws to be incorporated in that revision, and repeals "all the statutes of England or Great Britain" not included therein. Dig. State Miss. Ter. 247, § 4; Ib. 249, § 8; Rev. Code 555, § 5; Ib. 1 — 8, § 8; How. & Hutch. 36, § 4.

But whatever the origin of the doctrine of charities, it has no application to this case, for it only applies to *public* charities. 2 Story's Eq. 536, § 1190. Nor has it any application in this country. The common law is adopted only so far as applicable to our institutions and circumstances. 2 Pet. 144; 8 Ib. 591; 9 Cranch, 292; 1 S. & M. 562; 15 Johns. 115.

The doctrine originated in the religious notions formerly entertained in England. 7 Ves. 69; 2 Story's Eq. ch. 32, p. 489. It is sustained upon the arbitrary principle that the king is *parens patriæ*, and by virtue of his general superintending power of the public interests, has the right to guard and enforce public charities; and the chancellor acts, not in virtue of his jurisdiction in chancery, but as the personal delegate of the crown, administering a branch of the royal prerogative. 2 Story's Eq. 535, § 1188 — 1190. There is nothing in the origin of the doctrine, in the principles upon which it is sustained, or the mode in which it is administered, that is in harmony with the enlightened spirit of this age, or consistent with the principles or practice of a republican government.

It is odious even in England, though fastened on them by early adjudications. *Mossridge v. Thackwell*, the leading case, was decided by Lord Eldon with manifest reluctance. 7 Ves. 36, and he says in 1 Merriv. 55, 99, "Much against my inclination." Lord Thurlow (in 1 Ves. 474,) Arden (in 4 Ves. 14,) and

Loughborough (3 Ves. 469,) disapprove of it, and so does Story. Such a doctrine ought not to be adopted.

The doctrine is administered in some cases by the king, under his sign manual, in others by the chancellor on an information filed by the attorney-general, or by a special commission issued under the 43 Eliz. 7 Ves. 86; 2 Story, *ut supra*. All this is impracticable here. Our laws provide no such machinery. The states, on the revolution, succeeded to the rights of the crown, but "with many a flower of prerogative struck from their hands." This is one of them, this superintendence of charities. 9 Cranch, 50.

Even if the doctrine had ever prevailed here, the repeal of the statute 43 Eliz. should be held to abolish the whole doctrine. Such has been the case in North Carolina. See the cases before cited from that state. 2 Iredell, 255.

In England no charity is now supported unless it comes within the 43 Eliz. and that statute was found to operate as a "*public mischief*," tending "to the disherison of lawful heirs," and the 9 Geo. II. chap. 36, was passed to restrain its operation. Story recommends its adoption in this country. 2 Story, 510, 3d edition.

It has been seen that devises to slaves, or to trustees, for their benefit, are void. Yet, why hold them void, if the chancellor can sustain them as charities? See Tucker's opinion, 3 Leigh, 480, and 2 Iredell, 255, as to the propriety of adopting this doctrine.

5. The last point is raised by the demurrer of Mrs. Ross, only upon the 11th section of the act of February 26, 1842. Pamphlet Acts of 1842, 69, 70. There is no allegation that the executors have been restrained; but it is alleged that they have refused to remove the negroes, and the question is, whether the statute is constitutional and operative, or null and void.

The chancellor did not deny the validity of the law, but disputed its application to the case, because of the refusal of the executors to act. That was, in truth, the very case for which the statute provides, and unless it is void, it must apply.

The act proceeds, apparently, on the assumption that the trust is discretionary, not compulsory; and it fixes the reasonable time allowed to the executor to act before the resulting trust in favor of the heirs takes effect. 2 S. & M. 30. If this assumption as to the character of the trust is correct, and if it is thought that the chancellor may sustain it as a charity, then it must be done upon the artificial reasoning before alluded to. The idea of a *right* in any person is excluded. If a legal right is vested, the parties must enforce it, and the crown cannot interfere. There is then no vested right divested — the obligation of no contract is impaired — and no constitutional prohibition is violated.

But if the legal estate passed to the slaves, or the trustee, the statute is still good as a statute of limitation. Such laws, even when applied to antecedent contracts, have never been held to impair their obligation. 3 Story on Const. 351; 4 Wheat. 200, 206, 207; 12 Ibid. 262, 263, 349, 350.

On the point which was made by consent, though not presented by the record, as to the corporate capacity of the colonization society to take under the will of Isaac Ross, the court is referred to the following authorities, to show that a grant to a corporation, for purposes not within its corporate powers, is void. Ang. & Ames on Corp. 60, 86, 139; 2 Kent's Com. 298, 299; 1 Kyd on Corp. 72; *Beatty v. Lessee of Knowler*, 4 Peters, 152; *Head & Amory v. Prov. Ins. Co.* 2 Cranch, 127; 4 Wheat. 636; *People v. Utica Ins. Co.* 15 Johns. 358; *Broughton v. Man. Water Works Co.* 3 Barn. & Cress. 1; *First Parish in Sutton v. Cole*, 3 Pick. 237; *McGier v. Aaron*, 1 Penn. R. 49; *Greene v. Dennis*, 6 Conn. 304; *Trustees of Phillips Academy v. King*, 12 Mass. 555; *In the Matter of Howe*, 1 Paige's C. R. 214; *Jackson v. Hartwell*, 8 Johns. 422; *Mayor and Councils of Philadelphia v. Executors of Hills*, 3 Rawle, 170.

Quitman and *McMurrin*, for appellees.

The will of Isaac Ross, in controversy in this case, has been established by the high court, and its devises and bequests declared valid. *Ross v. Vertner et al.* 5 Howard. The decision

in that case, by necessary implication, covers the following points:

1. That a testator may by will direct his slaves to be sent out of the state, for the purpose of emancipation.

2. That the disposition of the real and personal estate, is valid.

3. That by the will the heirs and distributees of Isaac Ross, were entirely divested of all right and title to the whole or any part of his estate.

The executors, however, having failed to execute the trusts devolved upon them by the will, the American Colonization Society have brought their bill to enforce the trusts.

It is objected that this court has not jurisdiction, and that if complainants have any right, it should be asserted in the probate court. Courts of equity have jurisdiction even in cases of implied trusts. Toller on Ex. 480-489.

The constitution of our state vests in the court of chancery, *full* jurisdiction in all matters in equity.

A legatee can file a bill after the expiration of one year. Toller on Ex. 313.

Debts of a testator are presumed to be paid, three years after the grant of letters testamentary. 2 Meriv. 491.

The probate court has no jurisdiction to enforce the performance of any duties not in the ordinary course of administration.

The trusts enjoined in the will of Captain Ross, are not only express and technical trusts, but trusts of the most delicate character. The great object of the will is not the settlement of the estate, but its disposition after the mere administration has been completed.

It is again objected, that it does not appear by the bill that the American Colonization Society were incorporated at the time of the death of Ross. It is sufficient that they aver that they are incorporated. It will be presumed that they were incorporated at the time of the decease of Ross. Ang. & Ames on Cor. 45. They allege they were always ready to perform their trusts. But this objection goes to the character of the parties, and can only be available by plea.

It is not, however, necessary they should have been incorporated at the time of the decease of Ross. It was sufficient that the corporation should be in *esse*, when their right to take commenced. A devise to a corporation to be created is good, as an executory devise. Ang. & Ames on Cor. 122; *Sanderson v. White*, 18 Pick. R. 356; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 115, 144.

But it is objected that these devises and bequests are for the benefit of slaves, and that slaves cannot take by direct bequest, nor as *cestuys*. Conditional emancipation is valid. Law of Slavery, 314, 315; 2 Call's R. 319, 357; 2 Leigh's R. 189. If they may be liberated conditionally, they may take by executory devise. 2 Hill's Ch. R. *Leach v. Cooley*, 6 S. & M. 93; *Ross v. Vertner*, 5 How. R. 305. In this case, however, it matters not whether the slaves to be freed can take or not. From the peculiar character of the trusts in the will the complainants can take for them.

The complainants are a charitable association. Their chief object is to transport free negroes, among whom are those entitled to freedom when removed to Africa. The right of directing and superintending this removal, is conferred in the will. It is a right consonant with the purposes of the corporate creation, and a right which they can enforce. If the negroes conditionally entitled to freedom are not considered as ever having any rights which they could enforce, which is not admitted, still, if the right of superintending their removal is given to the society, it can be enforced by the society. The court will proceed as far as practicable in enforcing the lawful intentions of the testator. The words "direction and superintendence" give to the society the right of receiving the slaves. In the case of the Commissioners of the Sinking Fund suing, this court held that the charter of the Planters Bank, authorizing the commissioners to manage and control the fund, vested in them a right to receive and sue for it, &c. *Com. Sinking Fund v. Walker*.

Some of the trusts in the will are, although also for the benefit of the slaves to be freed, yet they may be considered equally for the benefit of the complainants, being promotive of their objects of colonizing negroes in Africa.

Again, in case the slaves should refuse to go to Africa, the proceeds of the whole estate are to be paid over to the complainants, in aid of the very objects of their creation as an association. The colonizing of free persons of color in Africa unquestionably includes provision for their maintenance and education.

The bequests are therefore for the benefit of the corporation as well as the slaves, and in one contingency are indeed for the exclusive benefit of the society. While we admit that American courts of equity have not in general the power to administer charities on the principle of *cy pres*, and also admit that in our state the statute of the 49th Elizabeth has been repealed, we insist that the current of authority is in favor of the jurisdiction of courts of equity over charities, where the objects are sufficiently designated by the will of the testator. Ang. & Ames on Cor.; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 115; Ang. & Ames, 116, et passim to 122; 7 Ver. R. 241; 2 Kent's Com. 231; *Griffin v. Graham*, 1 Hawks, 96; 17 Serg. & R. 88; 16 Pick. 107; 3 Paige, 296.

The decision in the case of *Baptist Association v. Hart*, 4 Wheaton, has been overruled, and is now generally deemed wrong. 6 Paige's R. 549; 7 Paige, 77; 4 Drum. R. 357; 9 Cowen's R. 437; 2 Kent's Com. 287. Nor is it necessary, in such cases, where the trust is definite in its objects, and a trustee sufficiently designated, that the attorney-general should be a party. Courts of equity will supply a trustee, if necessary, or designate who or what person or corporation was designed to carry out the trust; will even remedy defects in the trust.

The act of 1842 does not apply to this case. The bill states that three of the executors were willing to carry out the provisions of the will, but were prevented by the wrongful acts of one of the parties. They have been therefore prevented by the acts of Wade from removing them, and the case before the court comes clearly within the exception of the statute. But if not included within the *exception*, the law cannot be construed to affect vested rights then existing. It cannot be supposed that the legislature intended to violate private rights,

actually vested and in litigation. If they so intended, they could not do so.

On the question of the capacity of the American Colonization Society to take under the charter of 1831, we refer to the arguments and authorities cited by Mr. Prentice, reported 5 How. R. 353, 354, 355, on this subject. The objects of the society, as set forth in the charter, were the colonization of free persons of color in Africa. The society are to determine what shall be conducive to that object. The word free persons of color certainly include those by the laws of a state entitled to freedom. Colonizing includes the power of maintaining and educating the colonists. These were the objects of the bequests.

The act of 1842, violates vested rights in this, that the slaves were entitled to be sent to Liberia; that the Colonization Society were entitled to certain rights, upon an act to be done by the executors, and while endeavoring to compel the executors to do this precedent act, the law comes in and forbids the precedent act to be done, upon which the executory devise is to take effect.

George S. Yerger, in reply.

It is contended, on behalf of the complainants, that the question has been settled by this court, in the case of *Ross v. Vertner*, 5 How. 305. If that case settles this, of course its authority is decisive, and we have nothing further to say. But we deny that that case decides anything more than that the executors were the persons to execute the trust, that the trust was valid, and that the court would not interfere by injunction. The court did not decide, for the question was not raised in the record, that the executors could be compelled to execute the trust, or if they could, that complainants could compel them.

It will not be disputed, that many trusts are valid if executed by the trustee, that cannot be carried into effect compulsorily. This is admitted by the chancellor, and by the counsel who argued the case of *Ross v. Vertner*. Free. Ch. R. 603; 2 S. &

M. 30. It is clear, where a trust is created or directed, and the law has provided no means of enforcing it, it is in such case a discretionary, as contradistinguished from a directory or positive trust, as in 2 S. & M. 30.

Suppose the American Colonization Society had not been mentioned, could the slaves maintain a suit? Unquestionably not. They have no civil capacity; they cannot sue or be sued.

In Tennessee and other states provision is made by statute. They authorize suits to be brought in such cases by the slaves by next friend, which removes the incapacity. But here there is no such statute; but a statute prohibiting such devises altogether.

It is admitted, in the case in 2 Hill, that the suit can be maintained, but the court say, relief can be given incidentally, that is, if a suit is instituted by the heirs, to enjoin, that they will in such suit decree the executor to *perform*, and this without a cross-bill or any prayer in the bill. And they say, such a decree might be made, when a bill was filed by partition. To say the least of it, this dictum of the court is a novelty. The heir prays the executor to be enjoined, and the court decrees the executor shall be compelled to perform.

But suppose the executor refuses to carry the will into effect? Suppose the devisees divide by consent, or there is but one legatee, how then will the court get along?

At all events no such decree was made in the case of *Ross v. Vertner*, and it cannot be made now in the case in favor of complainants, unless they have such an interest as will sustain the suit, unless there is a valid devise to them.

The question then is, not whether this is a valid trust, which the executor may execute, but whether it is one which the complainants can compel him to execute; or, in other words, whether a mere stranger in interest, as I think the complainants are, have any right to file this bill.

II. Have the complainants any interest? If they have not, although the trust is a valid one, they cannot enforce it.

It is contended they have. It is contended that the devise that the slaves should be sent to Liberia under their supervision,

Wade at al. v. American Colonization Society.

is a devise to them in equity of the slaves, for the purpose of executing the trust.

It is contended, that the words "superintendence" and "direction" of the American Colonization Society, gives to them, in equity, after the crop is raised and the debts paid, the custody of the slaves, the right of possession, and to send them off, &c. Admitting this to be true, could the complainants, by virtue of their charter, take or hold the slaves, or take or hold any property for such a purpose?

'This depends upon their charter. The charter was granted by Maryland. The law of Maryland governs its extent. We cannot give to it any greater power than by that law is given to it. *Bank of Augusta v. Earl*, 13 Pet. R. 879.

A corporation may be a trustee, I admit, where its charter authorizes it, or where it is silent; but where there is a prohibition, it cannot hold for charitable or any other purpose.

The charter is express as language can make it. It is only authorized to hold property, real and personal, money, &c., to colonize free persons of color residing in the United States, and for no other purpose whatever. Here is a devise of land and money and property, not for the propose of colonizing free, but for sending off slaves, that they might thereafter become free. This is negatived by the express language of the charter. The law of Maryland prohibits it. 8 Gill & Johns. 319; 6 Con. Rep. 293.

There is not only no power for it to take a devise of slaves to colonize them, but it is directly prohibited. The devise is therefore void, not merely for want of power in the corporation, to take for such a purpose, but also because the charter prohibits them from holding for any purpose but that specified in it.

In England, the statute of wills prohibited a corporation from being a devisee; this was construed in favor of charitable bequests to mean in equity bequests for its own use. But when there was a devise for a charity, not for itself, it was holden good in equity.

But suppose the statute had given it power to hold in trust for one charitable purpose, i. e. to establish seminaries of learn-

ing there, and for no other purpose, could it have held for any other? It is believed not. No court could have so held.

The cases cited from Ang. & Ames on Corporations, 100, are cases where there was nothing in the charter prohibitory in its character. The cases cited in fact prove my position.

It is admitted, that where a corporation has capacity to take and hold property for itself, it may hold it as trustee, unless restrained to particular trusts, or restrained from holding as trustee. All the cases cited were cases where there was no prohibition, and where the corporation could hold property, except cases which arise under the statute of wills, and in regard to these, the devise was void at law, but good in equity, because it held not for itself, but for another. But if the statute had said it should not hold, as devisee, a trust, except for certain specified trusts, and no other, it could not surely, either in law or equity, hold for another such prohibited trust.

III. But it may be said, if this be so, if the decree is void for incapacity in the devisee, the court will not let the trust fail for want of a trustee; but in the case of personal property, the personal representative will be deemed a trustee, and the heir a trustee of the realty. 2 Story, § 976, and cases there cited.

This I admit to be true as a general rule. But I have two answers to give to it.

1. Admit it to be true, that this is a valid trust and not a mere power, the complainants cannot enforce the execution of the trust, as they are not trustees, and have no legal or equitable interest. It defeats this bill.

2. Where there is no trustee appointed or the appointment is void, and there is a valid trust created, the heir or executor will be decreed to be a trustee. But this only applies to cases, where the *cestui que trust* can sue or compel an execution. A court of equity can only declare their trustees, at the suit of those interested as *cestui que trusts*. If they cannot maintain a suit, equity cannot enforce the trusts, but must leave it to the voluntary action of the trustee. As is illustrated in the case in 2 S. & M. 30. The case is analogous to trusts clearly created, but the objects of which are uncertain. 2 Story's Eq. sect. 979 a.

979 *b.* Here are cases of trusts, which could not be executed, although the trusts were certain. In Tennessee a statute was passed to meet this identical case.

The decree to complainants of the money, land and slaves, is therefore void; and whether any other person can maintain the bill, is not the question. If they cannot maintain it, they must go out of court.

The same rule applies to all the bequests. The devise of the money and property to transport the slaves and support them in Liberia is *void*, because prohibited by the charter.

IV. So the devise for a school in Liberia is void, because if the charter does not prohibit holding for this purpose, or if it be such a charity as will be sustained, although void at law, yet it is given upon the condition that the slaves refuse to go. The bill is not filed to sell them for this reason; it does not aver, they refuse to go; it avers they have not refused to go, therefore this bequest cannot take effect—under this bequest nothing vests, unless they elected not to go.

V. The chancellor, in his opinion, endeavored to sustain the bequests upon the ground that they were charities, and although void at law, yet equity would sustain them.

There is only one charitable bequest in the will; that is the bequest to the society of the real and personal estate, to establish a seminary of learning in Liberia, and this is given upon condition that the slaves refused to go, and elected to be sold in this country. The bill and its prayer were not filed with a view to this; and, in fact, this never vested, because they did not elect to stay.

A devise to slaves or to trustees to set them free, may be a benevolence, but it is surely not a charity, within the meaning of that term. See 2 Story's Eq. as to what are charities, sections 1155, 1157, 1158, 1160, 1161, 1164.

But if it were a charity, as the charter prohibits from holding for such a purpose, or such a charity, it could not be enforced by complainants as a charity by bill, in the name of the society, as it cannot hold either in law or equity for such a purpose, but must be enforced some other way, either by act of the legislature or otherwise.

The cases in *Angel & Ames*, 100, I have shown, were cases where the corporators were not prohibited from holding.

The case of *Baptist Association v. Hart*, 4 Wheat. is directly in point. In that case the devise was void, because devisee could not take, and the party for whose benefit the charity or trust was created, could not sue, as the trust was too indefinite to be maintained in their names. So here the complainants cannot sue, because the devise is void; nor can the slaves for whose benefit it was created, because they cannot maintain a suit. But that case is said to be shaken or overruled. But on what ground? Because that was clearly a charity, and although the devise was void as a direct bequest, yet as a charity, chancery would support it, according to the *cy pres* doctrine. 2 Story, sections 1169, 1170. But that case is unquestioned law, in cases where the devise is not a charity within the technical meaning of the term. When bequests to individuals, no person questions it. If the devise had been to a corporation to be afterwards created, it might be good as an executory devise. But a bequest to a corporation not in existence, or to one in existence, which it is prohibited from taking, is surely void. This case of *Baptist Association v. Hart*, is not doubted as law, upon any principle, except that it was a charity, which is governed by peculiar rules, and may be enforced, when devises to individuals will not by the rules of the common law.

VI. The act of 1842 is a complete bar. It is not unconstitutional; it is a mere act of limitation. It gives one year to remove them. The exception in the statute cannot be extended. This court can create no exceptions not engrafted on the statute.

Do the complainants come within any of the exceptions? They do not. They must remove them, or commence proceedings for that purpose within the year. The law of this state, limiting the lien of old judgments, is void, if this is void. That this is a mere act of limitations, see 13 Pet. R. 45. The act was intended to bar, when those interested do not act. It was intended, if those to whom the trust was confided do not act, it shall be barred. The principle is familiar. Executor and

trustee may refuse to sue for property, and the *cestui que trusts* are barred. *Wyer v. East India Company*, 1 P. Williams, and many other cases. The law is well settled, that if the case made by the bill is barred by limitations, it may be reached in equity by demurrer. Story Eq. Pl.; *Dunlap v. Gibb*, 4 Yerg. R.; *Gordon v. Blackman*, Richardson's Eq. R. 61.

Mr. Justice CLAYTON delivered the opinion of the court.

The contest in this case grows out of the same will which was the subject of controversy in the case of *James B. Ross et al. v. Verther et al.* 5 How. 305. The bill was filed, in that case, by the heirs and distributees of the testator, against his executors, to prevent the execution of the trusts of the will; in the present case it is filed by the American Colonization Society, as a trustee, against the executors to compel the execution of those trusts, and to carry out the provisions.

It may aid our conclusion on this occasion, to ascertain precisely what was the controversy in the former suit, and what was determined by it. That "bill sets out the will, and avers that its provisions and trusts in relation to the transportation of the slaves to the coast of Africa, are in violation of the policy of this state, and in fraud of the statute on the subject of manumission, and are therefore illegal and void. That the provision for their support and maintenance, when carried to Africa, is illegal and void, because the trust is for an illegal purpose. And that the contingent bequest for the establishment of a seminary of learning is void, because against the policy of the state of Mississippi, and because the American Colonization Society has no capacity to take for such a purpose. The bill concludes with a prayer, that the estate embraced in said illegal and void trusts, be decreed to complainants, as sole heirs at law."

There was a general demurrer to the bill. The case was elaborately argued; and the several positions assumed in the bill were discussed with much zeal. It was contended that if the bequests and devises of the will were void, "the executors were trustees for the heirs, and could not dispose of the estate

for charities or other objects to be selected either by the executors or the court." The court decided that the trust created by the will was valid.

To the present bill, there is likewise a general demurrer; and the first ground assumed in support of it is, that the chancery court has no jurisdiction, because "it is purely a matter of administration cognizable in the probate court."

In *Carmichael v. Browder*, (3 How. 255,) the leading case upon this subject, the court say, "The broad proposition that an administrator cannot, for any purpose, resort to a court of equity, or that he cannot, in that capacity, be there proceeded against for any contingency, was never intended to be asserted, nor do the opinions warrant any such conclusion. We do not mean to decide, that there are not cases arising in the course of administration, which may be proper for the interposition of a court of equity. The same rule which is applicable to other courts of law, will no doubt apply to this. If it be wholly incompetent to give relief, and the party have not, by his own laches, lost his remedy, then it might be a proper case for equity jurisdiction."

It is thus plain, that there may be cases growing out of wills, which are the proper subjects of equitable jurisdiction. Of this class must be many *trusts*. They are creatures of courts of equity; and the abuses of trusts and confidences are wholly without any cognizance at the common law, and beyond the reach of legal process. See 1 Story's Eq. 28. Trusts may arise under a will; if they be of a character which requires equitable interposition, the fact that they were created by a will cannot exclude the jurisdiction of equity. It may not be easy to draw a line, which in all such cases separates the jurisdiction of the two courts. The power of the probate court to give full and adequate relief, must always be a material circumstance. We think here the full measure of relief could only be attained in equity, and therefore that the court had jurisdiction.

It is also insisted in argument that these bequests are void, first because they are to slaves, and that slaves have no capacity

to take—next that they are void because the trustee, the American Colonization Society, has no capacity to take, and lastly, that being void, a court of chancery cannot enforce them, as charities.

The first of these objections is directly opposed to the decision of this court in the former case. It is also opposed to the case of *Leach v. Cooley*, 6 S. & M. 93; in which it was holden, that "the right of freedom under the will is inchoate, and becomes complete when the subjects of it are removed. The bequest to the slaves is not void for want of capacity in the legatees to take." Precisely the same principle is recognized in *Henry et al. v. Hogan*, 4 Hum. 208; a case in which the slaves were obliged to go to Liberia, to obtain the benefit of the bequest of their freedom, and in which the property appropriated to raise a fund for the payment of their expenses, was held to be properly applicable to that purpose. See also *Hope v. Johnson*, 2 Yerg. 123; 8 Pet. 239. In Virginia such dispositions have been supported. *Elder v. Elder's Ex.* 4 Leigh, 252; *Dunn v. Ames*, 1 Leigh, 465. So in South Carolina, 2 Hill's Ch. R. 305.

The capacity of the Colonization Society to take, is of necessity, also directly affirmed by the former decision. On no other principle, could the trust have been pronounced valid. A bequest to this very society was sustained in *Burbank v. Whitney*, 24 Pick.; so in *Bartlett v. Nye*, 4 Met. 378, in which a bequest to unincorporated societies was held valid. But we need not go the length of this latter case. This objection is made upon demurrer to the bill, and it seems confined and narrowed down to the point, that the bill does not aver that the society was incorporated, at the death of the testator. The bill states that the complainants are duly and legally incorporated; that they are willing to accept and appropriate the funds, as provided for in the will; the object of the society by their charter being in accordance with the provisions of said will and in furtherance thereof. It further alleges that by the decisions of the courts, the said will and its provisions were fully established, and the rights of complainants to said slaves

and estate, in trust as bequeathed in said will and for the purposes therein contained, were fully confirmed." Taking all these statements together, we see no room for this objection. If the society be incorporated; if its purposes be in accordance with this will; if the provisions of the will have been theretofore established, and the rights of the complainants fully confirmed, all of which are admitted by the demurrer, then it was properly disallowed.

It is next contended that if these devises are invalid, either for want of capacity to take on the part of the donees, or of the trustees; then equity cannot enforce them as charities. To this we reply, that if the trusts created by this will be valid, then there is no room and no necessity for the application of the doctrine of charities. It is only where the bequest or devise is too vague or indefinite, for those intended to be benefited, to claim any interest under them, that the doctrine as to charities arises. It is clearly settled that "definite charities are trusts, which equity will execute by virtue of its ordinary jurisdiction." *Gallego's Ex'rs v. Lambert*, 3 Leigh; 3 Peters, 100. Charities begin where definite trusts end. It is therefore wholly unnecessary for us to inquire whether the statute 43 Elizabeth is in force in this state, and whether the court of chancery has any jurisdiction over charities to compel their performance, apart from and independent of that statute. It may not be out of place, however, to remark, as this point was urged in argument with great zeal, that in the late case of *Vidal v. Girard's Ex'rs*, (2 How. S. C. R.) that court modified very much, if it did not overrule, the case of *Hart's Ex'rs v. Baptist Association*, 4 Wheat. 1. The court there said, "that new sources of information, recently developed, established conclusively, that long before that statute, courts of chancery exercised jurisdiction over charities, not only where they were indefinite in their nature, but where either no trustees were appointed or where they were not competent to take." The opinion was delivered by Judge Story, and must be regarded also as an abandonment of the opinion upon this subject, expressed in his Commentaries upon

Equity. But in this case it is matter of speculation rather than of practical use, because we see no reason to change the former opinion, that these trusts, so far as it is necessary now to determinè them, are valid.

The other counsel for the appellant does not controvert the case of *Ross v. Vertner*, and admits that decision to be conclusive so far as it goes. He says that was a proceeding to prevent the executors from acting; this is an attempt to compel them to act. The court then very properly declined to interfere. The question now is, according to this argument, not whether this is a valid trust which the executor may execute, but whether it is one which the complainants can compel him to execute. If the trust be a valid one, have the complainants any interest?

To this we reply, "that if a bequest be accompanied by words expressing a command, recommendation, entreaty or hope on the part of the testator, that the property will be disposed of in favor of another, a trust will be created; first, if the words on the whole are sufficiently certain; second, if the subject be sufficiently certain; and third, if the object be also sufficiently certain." *Hill on Trustees*, 71. All these requisites concurred in the present instance. The intention of the testator here cannot be mistaken, and that intention must be carried into effect if it be not opposed to the law of the land. *Inglis v. S. S. Harbor*, 3 Peters, 99. His request is imperative. The subject is certain beyond doubt—his slaves—and the object equally so—their liberation. The provisions of the will constitute both the executors and the colonization society trustees. Where the duty of the one ceases, the other commences. It is the duty of the executors to deliver the slaves to the society for the purposes of the will; and it is the duty of the society to carry out those purposes. If a part of the trustees will not discharge their duty, and interpose obstacles to the execution of the trust by the others, clearly a court of equity may enforce the performance.

We need not now decide whether any remedy exists on the part of the slaves, if there had been no trustee under the will. That is entirely distinct from the right of the trustee to come

into a court of equity to enforce the trust. It is in cases where there is no one capable of enforcing the trust, that in England the attorney-general is made a party. It is one of the rules of equity not to permit a valid trust to be defeated for want of a trustee. We need not decide this, but we take occasion to say, that in several of the states it has been held that the mere intention of the testator to emancipate, conferred a right to freedom, which, though it cannot be asserted in a court of law, may be enforced in a court of equity. *Dempsey v. Lawrence*, Gilm. 333; 1 Leigh's R. 471; *Charles v. French*, 6 J. J. Marsh. 333; *Throckmorton v. Jenny*, 5 Monr. 585; 1 Ib. 130; *Frazier v. Frazier*, 2 Hill's Ch. R. 317; *Williams v. Maunsell*, 1 Rob. Va. Rep. 647.

It is again insisted that this society is prohibited by its charter from taking or holding property except for one purpose, that "of colonizing with their own consent upon the coast of Africa, the free people of color residing in the United States." We do not give to the charter the same restricted construction that the counsel do. It is true the charter confers no right to transport *slaves* to Africa, there to be colonized. But the slaves of to day may be free to morrow, and when free, may with their own consent be so transported. In the present instance these slaves are not now free, but they have an inchoate right to freedom. As soon as they are taken beyond the limits of this state that right is so far consummated, that by the terms of the charter they may be transported and colonized. In this there is no violation either of the laws of this state or of the charter; and such provisions have been repeatedly carried into effect by the society without objection.

Moreover, according to the authorities, this question can only arise between the corporation and the state which granted the charter. On this point the supreme court of the United States says: "If the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it; but it will furnish no ground to declare the trust itself void, if otherwise unexceptionable." "If the trusts were in

Wade et al. v. American Colonization Society.

themselves valid in point of law, it is plain that neither the heirs of the testator, nor any other private person, can have right to inquire into or contest the right of the corporation; it could only be done by the state." 2 How. S. C. R. 189,—191.

Great reliance has been placed in argument on an act passed in 1842, which gives twelve months for the removal of slaves *therefore* liberated, and declares the bequest of freedom to be void if they do not so remove.

It will be borne in mind that before the passage of this law, the provisions of this will had been declared valid by the judgment of this court, and the slaves declared entitled to an inchoate right of freedom, which would be perfect by their removal from the state. The bill shows the use of every means in the power of the complainants or of those for whom they act, to comply with this law. This suit was brought within the twelve months, to compel the executor to comply with the will, and to deliver them up for removal. If the statute have taken away their right to freedom it has been against their best efforts, and those of their trustees. It has been by a breach of trust and perversion of power. Can the end be attained by such means? This court has decided, upon very high authority, in reference to the Choctaw Indians, that if they have been prevented by *force* from complying with the condition imposed by the treaty, of five years continued residence upon their reservations, it will be regarded as if they had complied. *Doe v. Coleman*, 4 S. & M. 46. Rights acquired by fraud cannot be sustained. These objects of the testator's solicitude and bounty have been detained here against their will, against the will of the society, and that of all the executors except one. If the act of the legislature stood free from any objection, we should be constrained to say, this was such a fraud upon the part of the executor so acting, that neither he nor any one claiming in virtue of his acts acquired any right. We need not determine the validity of the law. It has nothing to do with the case; the fraud of the party has placed him beyond its pale. How far it is constitutional might be a grave question, but that we do not now touch.

The order of the chancellor is affirmed.

GEORGE POINDEXTER vs. RENE LA ROCHE and MARY JANE LA ROCHE.

If the record shows that the counsel of both parties consented that a commissioner, appointed by the chancellor to take and state an account between the parties, should proceed *to take* the account, and there is no evidence that such consent was intended to give the commissioner authority also to proceed *to settle* his report without further notice to the parties, and he does proceed to settle his report without notice, and exceptions are filed to his report for the want of notice, the exceptions should be sustained, and the case recommitted to the commissioner.

Where a cause was referred to S. & F. or either of them, to state an account between the parties, and S. alone stated the account, and his report was excepted to, and the exceptions sustained, and the cause recommitted to "the commissioner;" *held*, that S. was the commissioner to whom the recommitment was made, and a report therefore made by F. upon the recommitment might properly be excepted to.

As a general rule an agent is a competent witness for as well as against his principal; but where a judgment in favor of the party calling him will procure a direct benefit to himself, is incompetent.

L. filed a bill against P. to foreclose a mortgage; P. answered that he had paid the debt secured by the mortgage to W. the agent of L. to whom, as agent, the mortgage was executed, and the notes thereby secured given; L. called W. as a witness to prove that the money, or a large portion of it, paid by P. to W. had been applied by W. without consulting P. to the payment of a debt which P. owed W. in his own right, and not the payment of the debt secured by the mortgage; and P. objected to W. as an interested, and therefore an incompetent witness: *Held*, that W., if permitted to testify, would possess the means of securing the payment of his own demand, and also to discharge himself from liability to his principal by charging P.; and his evidence, therefore, in relation to his individual transactions with P. was inadmissible.

It is settled that if a party who is indebted on a mortgage and simple contract, or on a bond and simple contract, makes a payment, and omits to apply it specially to one of the debts, the law will make the application in the way most beneficial to the debtor, that is, to the mortgage or bond.

700 HIGH COURT OF ERRORS AND APPEALS.

Poindexter v. La Roche et ux.

Where a person who is indebted both on a bond and on a judgment, sells his land, and the purchaser makes a payment to the creditor, without applying it to either the bond or judgment, the law will apply it to the judgment in exoneration of the land.

E. purchased land of P. which was incumbered by a mortgage executed by P. to W., as the agent of L., to secure the money contracted to be paid by P. to W. as the agent of L. for the land; W. also held a claim in his own right against P., not included in the mortgage; E. being indebted to P. for the land, paid the money to W. on P.'s account, not knowing that P. was indebted to W. individually, without making any application of the payment: *Held*, that W. had no right to apply the payment to his individual debt, and that the law would apply it to the reduction of the incumbrance resting upon the land.

Where a case is referred to a commissioner to state an account between the parties, and one of the parties files exceptions to the report of the commissioner, and the chancellor refers the exceptions to a master commissioner, who overrules all the exceptions, and the report of the master commissioner is confirmed by the chancellor, without any exceptions being taken thereto, the party who filed the exceptions to the report of the first commissioner, is not thereby concluded, but he may avail himself of the benefit of those exceptions in the high court of errors and appeals.

ERROR, from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

On the 1st day of February, 1837, George Poindexter, Thomas O. Enos, and Archibald Dunbar, by leave of the chancellor, filed in the superior court of chancery their bill of review, alleging that Rene La Roche and Mary Jane his wife, on 6th June, 1835, filed a bill against them in the circuit court of Wilkinson county, on the equity side of the court, averring that on 11th November, 1839, Poindexter mortgaged a tract of land, in Wilkinson county, to La Roche and wife, to secure the payment of a debt of about \$12000, due to them; which debt was secured by notes of Poindexter given to Nathaniel A. Ware, although in fact of La Roche and wife; and of which debt there then remained unpaid the sums of \$1215 and \$194 24, described in two notes falling due on the 1st January, 1835, and the sums of \$1214 and \$97 04, falling due on or before 1st January, 1836; that the land so mortgaged was sold by said Poindexter to Enos and Dunbar and possession delivered to them; and prayed for an account

and sale of the land to satisfy the debt. That Enos and Dunbar answered the bill admitting the purchase of the land from Poindexter, and praying for protection and a dismissal of the bill against them. Poindexter filed a demurrer to the bill which was overruled at the May term, 1836, of the circuit court, and sixty days allowed to answer. That on 1st November, 1836, Poindexter filed his answer, averring several payments, which, if they had been properly applied by Ware, would have extinguished the debt, and praying for an account; that on 8th November, 1836, a *pro confesso* was taken against Poindexter, and on the 10th day of November, 1836, an interlocutory decree was rendered referring the cause to a commissioner to take and state an account between the parties; that on the 11th day of November, 1836, the commissioner's report was returned and ordered to be confirmed. And on the 12th day of November, 1836, a final decree was signed and filed, decreeing the sum of \$3020 ⁰⁰/₁₀₀ to be due from Poindexter, and a sale of the lands mortgaged for the payment thereof. The record of the proceedings in the suit in the circuit court of Wilkinson county, was made exhibit to the bill of review. Complainants charged that there were many errors on the face of the interlocutory and final decrees; that the *pro confesso* was taken after an answer was filed by Poindexter; that the interlocutory decree to account was taken upon the bill as confessed by Poindexter when his answer was in; that the taking of the account was *ex parte*, the defendants proving no notice of the time and place of taking it; that the report of the commissioner was returned and confirmed in one day after the interlocutory decree to account; that the final decree was rendered in two days after the interlocutory decree to account. The bill prayed for a *certiorari* to remove the cause from the circuit court of Wilkinson county into the superior court of chancery; that the decree might be opened, set aside and reversed, and that a *supersedeas* be awarded superseding the decree, and for other relief, &c. &c. A *certiorari* was awarded to operate as a *supersedeas*, upon Poindexter's entering into bond in double the amount of the decree in the circuit court. The bond was given and the *certiorari* issued. The record of

the circuit court of Wilkinson county referred to, contained the bill of complaint of La Roche and wife stating that George Poindexter, on the 11th day of November, 1829, mortgaged to La Roche and wife two tracts of land lying in Wilkinson county, containing together about one thousand and nine acres; conditioned that the mortgage should be void when Poindexter paid fourteen promissory notes given by him to Nathaniel A. Ware, although in fact of La Roche and wife, and payable to his or their order, all dated 22d December, 1828, and amounting in the aggregate to eleven thousand two hundred and twenty dollars; that at the time of filing their bill, there were unpaid the sums of \$1215 and \$194 24, described in two of said notes falling due on 1st January, 1835, and the sums of \$1214 and \$97 04, due on two other of the notes on 1st January, 1836; that the lands remained in possession of said Poindexter till sometime in 1833, when they were conveyed by him to Thomas O. Enos and Archibald Dunbar, in whose possession they were at the filing of their bill; that La Roche and wife claimed the title to the premises as absolute in them; that they had frequently called on Poindexter in a friendly way, and requested him to pay the residue of the debt, and he always refused to do so. They prayed that Poindexter be decreed to pay the sums specified to be due on the notes as well as interest on the same; that Enos and Dunbar be forever barred from all equity of redemption and be decreed to deliver to them the possession of the premises and all the deeds and title papers they had to the same, or that the lands should be sold and out of the proceeds the balance due to La Roche and wife paid. The mortgage given by Poindexter to La Roche and wife was filed with the bill as an exhibit, and was conditioned to be void when Poindexter paid to La Roche and wife the fourteen following described notes given by Poindexter, and all dated 22d December, 1828, to wit: one due and payable on 1st January, 1830; second due and payable 1st January, 1831; third, on 1st January, 1832; fourth, 1st January, 1833, each for the sum of \$1214; fifth, due and payable on 1st January, 1834; sixth, 1st January, 1835, each for \$1215; seventh, 1st January, 1836, for \$1214; eighth,

1st January, 1830, for \$680; ninth, 1st January, 1831, for \$582 88; tenth, 1st January, 1832, for \$485 76; eleventh, 1st January, 1833, for \$388 64; twelfth, 1st January, 1834, for \$291 44; thirteenth, 1st January, 1835, for \$194 24; fourteenth, 1st January, 1836, for \$97 04; all drawn in favor of Nathaniel A. Ware, attorney in fact for La Roche and wife, and payable to his or their order, amounting to \$11,220. On the mortgage was indorsed a statement, that the seven last mentioned notes were given as the interest which might accrue on the respective instalments, for which the seven first mentioned notes were given, up to the time they respectively fall due; therefore, if Poindexter should pay the whole or any part of the seven instalments before they became due, that the notes, given for the interest, should be cancelled, so far as the payments should satisfy the instalments, in whole or in part.

Enos and Dunbar filed their answer, admitting the possession of the premises described in the bill, under a conveyance from Poindexter to them, but denying all collusion, and praying to be dismissed with reasonable costs. On 12th of May, 1836, George Poindexter filed a demurrer to the bill, which was overruled, and sixty days allowed to answer. On the 1st day of November, 1836, he filed his answer, stating that he purchased of Ware, as agent of La Roche and wife, the tracts of land described in the bill, and gave his fourteen notes, as stated in the bill, seven of which were for interest, and seven for the principal, and for payment of which, he executed a mortgage; that at divers times, he made payments to Nathaniel A. Ware, as attorney of La Roche and wife, which would have extinguished the debt secured by the mortgage, and he prayed an account to be taken. On the 8th day of November, 1836, it was ordered that the bill of La Roche and wife be taken, as confessed against Poindexter, for want of an answer within the sixty days allowed to answer in. On the 10th day of November, 1836, an interlocutory decree was made, to take an account, which decree was signed and filed, and referred to a commissioner of the court. On the 11th day of November, 1836, the commissioner made his report, showing an indebtedness to

complainants of \$3020 36; and on the same day it was ordered to be confirmed. On the 12th day of November, 1836, a final decree was rendered, decreeing Poindexter to be indebted to that amount, and barring his equity of redemption, and decreeing a sale of the mortgaged premises, or so much of them as would satisfy complainant's claim, and appointing the sheriff of Wilkinson county to execute the decree, and decreeing the costs to be paid by Poindexter, and eight per cent. interest on \$3020 36, from date of decree, till paid, &c.

On the 3d day of July, 1837, a motion was made to dismiss the bill of review for want of jurisdiction, which motion was, after argument, overruled. La Roche and wife then demurred to the bill of review; their demurrer was overruled, and the decree of the circuit court of Wilkinson county ordered to be opened for further proceedings. Poindexter then filed a cross bill, averring that he purchased the land described in the original bill, from Nathaniel A. Ware, as attorney in fact for La Roche and wife, that the notes for the purchase-money and mortgage given to secure them, were all drawn in favor of Ware, as attorney, and the payments had been principally made to him, and yet Ware was not a party to the bill filed to foreclose the mortgage, thereby departing from the contract as written, which was done for the purpose of introducing the deposition of Ware, that he might, by his own oath, discharge himself from liability to La Roche and wife, for the amount paid him by Poindexter for their benefit, and in discharge of the debt for the purchase of the land. That Poindexter, being in the city of Philadelphia, in 1831, paid La Roche, on account of the debt secured by the mortgage, the sum of fifteen hundred dollars, and took his receipt for that amount; that the receipt had been since lost or mislaid, and could not be produced; and he prayed that before a final decree was rendered, La Roche and wife might be compelled to disclose on oath whether the fifteen hundred dollars had not been paid as stated. La Roche and wife failed to answer the cross bill, and it was taken for confessed against them. Upon the petition of Poindexter, the cause was referred to A. M. Feltus and Nathaniel Scudder, or

either of them, as commissioners, to ascertain and report the amount due on the mortgage, and they were directed to take all legal and competent evidence, in relation to the payments made on the mortgage. In January, 1840, Nathaniel Scudder made a report that the parties appeared before him, by themselves or counsel, and by consent of the parties, he proceeded to ascertain the amount, principal and interest, due on the mortgage, and he found that Poindexter had given fourteen notes, seven being for the principal, amounting to \$8500, and seven for the interest thereon, amounting to \$2720, for the land bought of Nathaniel A. Ware, as attorney in fact of La Roche and wife, amounting, in the aggregate, to the sum of eleven thousand two hundred and twenty dollars, being the debt mentioned in the mortgage; and that Poindexter had paid, on account of that debt, the sum of thirteen thousand five hundred and sixty-one dollars and five cents, and had therefore overpaid it. The counsel of La Roche and wife, filed seven exceptions to the report of the commissioner. The sixth exception was in these words: "No notice of settling the report was given to La Roche and wife." On the 15th day of June, 1840, the following order was made, to wit: "The exceptions to the report of the commissioner, made in this case, having been submitted, and the chancellor fully advised thereof, doth order that the sixth exception to said report be allowed, and the cause again referred to said commissioner, to hear and determine the other exceptions filed to said report, on notice to the parties, according to the rules of this court." On the 9th day of December, 1840, A. M. Feltus made a report, stating that the counsel of the parties have entered into an agreement in these words: "It is agreed by the counsel for the complainants and defendants, that Monday, the 30th of November, A. D. 1840, shall be appointed by the commissioner, in this case, to account, as the day to settle the commissioner's report;" that as one of the commissioners appointed by the order of the chancellor, at the January term, 1839, in the absence of the other commissioner, he, at the request of the defendant, had proceeded to act in the case, and that neither the complainants nor their counsel ap-

pearing on the 30th day of November, 1840, to settle the commissioner's report, according to their written agreement, he therefore returned to the court the original report of the commissioner, Nathaniel Scudder, without alteration in any respect whatever. The same exceptions were again filed to this report, and sustained by the chancellor, and the cause was then referred to W. H. Dillingham, to take and state an account between the parties. Dillingham, on account of the delicate relations existing between the principal defendant and himself, declined to act; and the cause was then, upon the petition of the complainants, referred to Charles A. Lacoste, to state an account between the parties, with full power to examine witnesses, and receive any legal and competent evidence; and upon the petition of Poindexter, James T. McMurran was appointed to act as a commissioner, in conjunction with Charles A. Lacoste. On the 29th day of March, 1843, Charles A. Lacoste made a report, stating that after giving due notice to the parties of the time and place of taking the account, and both parties having adduced all the evidence they had to offer, and submitted their briefs, he proceeded to state the account; he found that the debt secured by the mortgage mentioned in the bill, was the consideration of a tract of land lying in Wilkinson county, sold by Nathaniel A. Ware, as agent and attorney in fact for La Roche and wife, to George Poindexter; that the fourteen notes named in the mortgage, were considered equivalent to \$8500, cash, on the first day of January, 1839; that the purchase-money was made payable in seven instalments, for which seven notes were given, and seven notes were given for the interest on the several instalments, the whole, including principal and interest, amounted to \$11,220; and reported that on the 18th day of March, 1843, there remained still unpaid of that debt, the sum of four thousand four hundred and six dollars and nine cents. The evidence reported by the commissioner was very voluminous, but it is not deemed necessary to notice here any other portion of it, than the evidence of Nathaniel A. Ware, a witness examined on the part of the complainants. He testified that he was the agent of the complainants,

from 1828 to 1836, to sell their lands in Mississippi, and secure and collect the purchase-money; that as agent, he sold, in 1828, a tract of land in Wilkinson county to George Poindexter, and took his notes for the purchase-money, secured by a mortgage on the land; there were seven principal and seven interest notes; the sale was on eight years credit, and interest was calculated on the whole consideration of the land, at eight per cent. per annum, from the 1st day of January, 1829; that all of the notes had been paid except the four last, and they had never been paid to deponent, nor to any one, as he believed; that Poindexter had paid La Roche, in Philadelphia, fifteen hundred dollars, and he had been credited with that amount by the direction of La Roche; about eighteen hundred and thirty-eight dollars and thirty-nine cents had been paid in the notes of Burrus & McGee, with which he had also been credited; that on the 20th day of February, 1834, Enos & Dunbar paid deponent, on account of Poindexter, eight thousand six hundred and sixteen dollars and twenty-two cents, twenty-seven hundred and eight dollars and ninety-three cents of which had been credited on the debt to La Roche and wife, and the residue deponent appropriated to the payment of a note which he held as his own property against Poindexter; and that no other payments than those above-mentioned were ever made to him by Poindexter or his agents on account of La Roche and wife. The counsel of Poindexter refused to cross-examine Ware, because they consider him an incompetent witness, and they excepted to his deposition being read on that ground. Poindexter filed numerous exceptions, covering thirty-five pages, to the report of the commissioner, Lacoste, which, by order of the chancellor, were referred to Robert Hughes, as master commissioner in chancery. On the 12th day of June, 1843, Robert Hughes made a report, disallowing all the exceptions taken to the report of Charles A. Lacoste. On the 13th day of June, 1843, the chancellor ordered the report of Robert Hughes to be confirmed; that the exceptions taken to the report of Lacoste to be disallowed, and that the report of Lacoste be in all things confirmed; and on the 3d day of July, 1843,

the chancellor rendered a final decree, in favor of La Roche, for the sum of four thousand four hundred and six dollars and nine cents, with interest thereon, at the rate of eight per cent. per annum, from the 18th day of March, 1843, until paid, and that the mortgaged premises be sold for the payment thereof, &c.

To reverse that decree, the defendants now prosecute this writ of error.

William Yerger, for plaintiffs in error.

Was Nathaniel A. Ware a competent witness, or not, in favor of the complainants, to prove that payments made by Poindexter to him were made to him on a note, which he held against Poindexter in his individual right, and not on the notes which he held for La Roche and wife, and which were payable to him as attorney in fact for La Roche and wife?

The rule is laid down that where the immediate effect of a judgment for the plaintiff is to confirm the witness in the enjoyment of an interest in possession, or to place him in the immediate possession of a right, he is not a competent witness for the plaintiff. *Greenleaf on Ev.* 438.

So, too, the rule is laid down, that where the event of the suit, if it is adverse to the party adducing the witness, will render the witness liable either to third persons or the party adducing him, the witness is incompetent. *Green. on Ev.* 438 to 442.

This principle is applied to all cases where the testimony of the witness adduced by the plaintiff would discharge him from the plaintiff's demand by establishing it against the defendant. *Green. on Ev.* 442, n. 1.

The principle contended for by me is distinctly and clearly recognized by the supreme court of Massachusetts, who have held that a witness, situated as Ware is, is incompetent on account of his interest. 10 Pick. R. 135.

There are some cases in which an agent has been permitted to testify, although interested, upon the ground of public policy and for the sake of trade; but this rule has only been extended to general agents, and does not extend to persons only employed

in the particular transaction in question. 8 Barn. & Cress. R. 408.

It is also admitted to be true that where the witness is equally interested on both sides, he is competent. But if there is a preponderance in the amount or value of interest on either side, he will be disqualified from testifying on that side. Green. on Ev. 464; *Carter v. Graves*, 6 Howard; 16 Johns. R. 39; 1 Stark. on Ev. 180, 519, 521; 7 Wheat. 338.

Montgomery and Boyd, for defendants in error, cited the following authorities: 4 Johns. Ch. R. 445; 5 Ib. 441; 6 Johns. R. 566; 2 Robinson's Practice, 383, 434; 2 Smith's Ch. Pr. 40, 70, 71, 164, 369; *Gildart's heirs v. Starke*, 1 How. 467; 2 Maddock's Chancery, 506, 507; 3 Johns. Ch. R. 78; 1 Paige's R. 145.

Mr. Justice Thacher delivered the opinion of the court.

This is a writ of error to the superior court of chancery.

The history of the case is as follows: In June, 1835, La Roche and wife filed their bill in the circuit court of Wilkinson county, against Poindexter, Enos and Dunbar, to foreclose a mortgage upon certain lands, executed by Poindexter, in 1829, to secure the payment of a sum of money, which amount, with its interest, was contained in fourteen promissory notes, made by Poindexter, in favor of Nathaniel A. Ware, the attorney in fact of La Roche and wife. It was charged, that there remained due and unpaid upon said notes, at the time of the filing of that bill, the sums of \$1215 and \$194 24 upon two of the notes, payable January 1st, 1835, and the sums of \$1214 and \$97 04 upon two of the notes, payable January 1st, 1836. Enos and Dunbar were purchasers of the land subsequently to the mortgage. After a variety of proceedings in the circuit court, and in November, 1836, a final decree was rendered in that court against Poindexter, as upon a *pro confesso*, for the sum of \$3026 36. In February, 1837, Poindexter filed in the superior court of chancery a bill of review to this decree, and the decree of the circuit court was re-opened, and in 1838 Poindexter filed

his cross-bill to the original bill, alleging a payment to La Roche in 1831, of \$1500. In January, 1839, this cross-bill was taken for confessed, and in March of that year, the cause was referred to Scudder and Feltus, or either of them, as commissioners, to state an account between the parties. In January, 1840, Scudder alone, by consent of parties, took the account, and then made his report to the effect that Poindexter had paid the whole amount secured by the mortgage, and a sum over and above it. To this report exceptions were taken, and the sixth exception, based upon the ground that no notice of the settling of the report had been given to La Roche being sustained, the report was referred back to the commissioner to determine the other exceptions. This report was afterwards reported again to the court, without any alteration, by Feltus, the other commissioner, La Roche and wife not appearing before him. In April, 1842, a motion to sustain the exceptions to this report was allowed, and the report set aside. Subsequently to this, Dillingham was appointed commissioner in the case, but he declining to act on account of his relations with Poindexter, Lacoste was appointed, and in January, 1843, upon the application of Poindexter, McMurran was added to the commission, and both, or either authorized to act in the matter. In March, 1843, Lacoste filed his report, charging a balance of \$4406 09 against Poindexter. Exceptions were filed by Poindexter to Lacoste's report, which were referred to the master commissioner, Hughes, who, in his report, June 13th, 1843, disallowed all the exceptions. Upon the 3d July, 1843, no further exceptions having been filed, the chancellor decreed finally in accordance with the report of Lacoste.

By an agreement of the counsel for both parties, all the proceedings in the Wilkinson county circuit court are to be disregarded in the examination of the case in this court, so far as any question of error may be concerned, and no objections to the form or manner of taking the depositions, or other formal objections connected with them are to be regarded, unless they appear by the record to have been saved by the parties.

The first point which presents itself for the consideration of

this court, is the order of the chancellor sustaining the sixth exception to Scudder's report, and recommitting it to the commissioner for the determination of the other exceptions. The record shows the consent of counsel, that the commissioner Scudder should proceed *to take* the account, but there is no evidence that such consent was extended to give him authority also to proceed *to settle* his report without further notice to the complainants. The 38th rule of the chancery court requires a commissioner, after an examination of an account is concluded, to assign the parties a day to attend before him to the settling of his report, and to make such objections as they may have, in writing. The report of Scudder was therefore properly re-committed, if for that purpose alone. Upon this reference, the other commissioner, Feltus, for the first time, assumed to act in the premises, and reported back the same report without alteration. The same exceptions became again the subject of an argument, upon the coming in of the report of Feltus, and they were sustained by the chancellor. This decision was also correct, even upon the sixth exception, because, in point of fact, his report was never settled by Scudder, upon due notice to the parties, as required by the 38th rule of the court. The recommitment of the report was to "the commissioner," and the agreement, signed by counsel upon the recommitment was, that a fixed day was set when "the commissioner" should settle his report. Who was that commissioner? Certainly, none other than Scudder. It was Scudder's report, in which Feltus had taken no part, and it was competent for either of the commissioners to commence the proceeding without the other. It appears plain from the record, as well as the natural consequence of the exceptions, that the recommitment was to Scudder, as the commissioner alone competent to determine the exceptions and settle the report.

A material question presented in the cause, is an objection made to the competency of Nathaniel A. Ware, as a witness, and which is made one of the exceptions to the report of Lacoste. Ware, as attorney in fact of La Roche and wife, was the payee of the notes secured by the mortgage, and in his testi-

mony, he alleges that Poindexter was indebted also to him individually, and that the payments made to him by Poindexter and Enos, or a portion of their amounts, were made on account of this individual indebtedness, and not to him as attorney in fact of La Roche and wife, and upon account of the mortgage debt. This question brings up the case of a principal relying upon the evidence of his agent. In the rules of evidence respecting the interest of a witness, there is an exception, constituting a rule in favor of the admissibility of agents; but there are exceptions again to this rule. One of these exceptions is where a judgment in favor of the party calling the witness will procure a direct benefit to the witness himself. 1 Greenl. Ev. 464. A direct benefit would accrue to Ware, by a judgment in favor of La Roche and wife. It was for Ware's interest to show that the money paid into his hands was paid to him upon his individual account, and not to him as the attorney in fact of La Roche and wife, because he at the same time secured the amount of his own debt, and provided La Roche and wife with a judgment against Poindexter. The interest of Ware consisted in possessing within his own control the means of securing the payment of his own demand, and also to discharge himself from liability to his principals, by charging Poindexter for them. Accordingly, we are inclined to hold all that portion of Ware's deposition which related to his individual transactions with Poindexter, to have been inadmissible in this case.

The report of LaCoste also raises another question of much moment in this controversy. The propriety of the application by Ware to his individual debt, of any portion of the payment made to him by Enos, may well be doubted. When Enos made the payment, it is true that he gave no directions respecting its application, but, under the circumstances, what application would the law make? The debt due La Roche and wife was a mortgage debt, and that due to Ware individually was a debt upon a simple contract. Enos was also a purchaser of the property encumbered by the mortgage debt, and he says that at the time of the payment to Ware he knew of no other debt due to Ware by Poindexter but the mortgage debt. Had Ware

any right, in this state of case, to appropriate the payment made by Enos to the extinguishment of any other than the debt secured by the mortgage? In the absence of any express direction, still a direction may be implied from circumstances. *Mitchell v. Dall*, 2 Har. & Gill. 159. It is surely a strong circumstance that the payment being made by Enos, whose only interest consisted in reducing the incumbrance resting upon the land of which he had become the purchaser, constituted a direction to apply the payment exclusively to that debt. It is settled, upon good authority, that "if a debtor is indebted on mortgage and simple contract, or on bond and simple contract, and when he makes a payment should neglect to apply it, the law will make application of it in the way most beneficial to the debtor; that is, to the mortgage or bond; and in some cases the fund out of which the money arose, will direct the application. As where A. is indebted on bond and on judgment, and sells his land, and the purchaser pays a sum of money to the creditor without application, the law will apply it to the judgment in exoneration of the land." *Gwinn et ux. v. Whittaker's Adm'r.* 1 Har. & Johns. 754; *Dorsey v. Garraway*, 2 Ibid. 402. See also *Patison et al. v. Hull et al.* 9 Cow. 747, where all the cases establishing the foregoing principle are collected and examined.

The ground assumed in the argument of this cause that as upon the reference and report of the master commissioner, Hughes, no exceptions were filed by the plaintiff in error, he is thereby concluded from claiming any examination or reaping any benefit from the exceptions to Lacoste's report, does not strike us with the force that seems to be trusted to it. There is no established rule or statute authorizing the chancellor to appoint a master commissioner, nor any rule by which the report of one commissioner can be referred to another for a determination of exceptions. The exceptions to Lacoste's report were addressed to the chancellor, and the chancellor, by making a decree based upon the report of the master commissioner, Hughes, can be considered only as having adopted the report of Hughes, and thereby to have virtually himself overruled the exceptions.

In accordance with the foregoing opinion, it follows as the judgment of this court, that the decree of the chancellor must be overruled, the exceptions above mentioned to Lacoste's report sustained, and that report set aside, and the cause remanded for further proceedings.

JOHN G. BOHR vs. STEAMBOAT BATON ROUGE.

An application for a continuance is addressed to the discretion of the court, and if it be refused, cannot generally be assigned as error.

It is competent for counsel to agree that a commission to take a deposition may issue at any time, and to provide that notice of the time and place of taking the deposition shall be given to their clients. Where, therefore, it was agreed between the counsel of both parties, that a commission should issue forthwith, without affidavit, to take a deposition, and that one day's notice of the time and place of taking the deposition should be given T. R. L. & Co.; and the notice was given to H. R. L. & Co., and a member of that firm attended the taking the deposition: *Held*, that the notice not being in accordance with the agreement, the deposition might be properly ruled out.

If a motion for a new trial be overruled by the circuit court, the high court of errors and appeals may reverse the judgment of the court below, either on account of an improper exclusion of evidence, or because the evidence greatly preponderated against the finding of the jury: but a new trial will not be granted unless it clearly appears that justice has not been done in the court below; or where it appears that the jury found according to the weight of evidence; or where there is little reason to suppose that a different result would ensue on another trial. A new trial will not therefore be granted because a deposition was improperly ruled out by the court below, which, if admitted, would not have justified a verdict in favor of the party offering it.

ERROR from the circuit court of Adams county; Hon. Charles C. Cage, judge.

On the 20th day of April, 1841, John G. Bohr sued out an attachment from the office of Louis Robitaille, a justice of the peace of Adams county, against the Steamboat Baton Rouge, the owners being unknown, to recover the sum of six hundred and thirty-six dollars, the alleged value of three boxes of merchandise, shipped on board of that boat from New Orleans to Natchez, and lost or destroyed through the negligence of the officers of the boat. On the 28th day of May, 1844, the cause

was tried in the circuit court of Adams county, and the jury returned a verdict in favor of the defendant. The plaintiff then moved for a new trial, the court overruled his motion and he filed a bill of exceptions, which discloses the following facts: When the cause was called for trial, the plaintiff moved for a continuance, because, on the 20th day of May, 1844, he had filed interrogatories, and given notice that he would, on the 23d day of May, 1844, sue out a commission to take the deposition of Francis P. Beck, to be read as evidence on his behalf, at the trial of the cause, which motion the court overruled. On the trial the plaintiff offered to read the deposition of Francis P. Beck, which proved in substance, that on the 24th day of May, 1841, he was a commission merchant in New Orleans, and on that day he received from shipboard, three boxes of merchandise, having the general appearance of boxes shipped from the north to New Orleans, and in good order; which boxes he shipped on the same day on board of the steamboat Baton Rouge, then lying at New Orleans, and bound for Natchez, Mississippi, marked J. G. Bohr, and consigned to John G. Bohr; that he knew nothing of their appearance when they were received, or where they were stowed on board of the ship. On cross-examination, he said the boxes were not stored in New Orleans; that he was not interested in the result of the suit, but he was interested in showing that the goods were not taken out of the boxes while in New Orleans, as he supposed he would be responsible for them, if taken out while the boxes were in his possession; that he did not know that the boxes were in the same condition when received in New Orleans, as they were when shipped at New York; he knew nothing of their contents, and only knew they were shipped by him by a reference to the bill of landing which was filled up by himself. Annexed to the deposition was an agreement, signed by the counsel of both parties, in these words: "It is hereby agreed that the affidavit in this case be waived, and that a commission be issued forthwith, and that notice of one day be given of the time and place of taking said deposition to Thomas R. Lee & Co., No. 7, Magazine street, New Orleans." The commis-

sioner before whom the deposition was taken, certified that he gave one day's notice of the time and place of taking the deposition to the firm of Henry R. Lee & Co., and Theodore Shute, a member of that firm, attended the taking the deposition. The court ruled out the deposition. No other evidence appears in the bill of exceptions. The plaintiff brought the case to this court by writ of error.

Thomas Reed, for plaintiff in error.

1. The first error assigned in this cause is, "that the court below erred in not granting a continuance of the cause at the term at which it was tried."

It appears, on looking into the record in this cause, that when it was called for trial, proceedings had been commenced to sue out a commission to take additional testimony; the commission had not issued; and it also appears, that the time required by law, for notice of the issuance of such commission, had not elapsed. The interrogatories were filed, affidavit had previously been made, and notice was given in conformity with the statute, H. & H. 603, sect. 16; 610, sect. 36.

We consider that under the practice of circuit courts it was unusual and erroneous to force the plaintiff to a trial, when he was manifesting every diligence to prosecute and bring his cause, with its full merits, before the court.

2. The second reason why the court erred, was, in not granting a new trial, the plaintiff being forced to a trial at the time he was using every exertion to prosecute his cause, and when, as the record shows, he had taken the preliminary steps to procure more evidence. He was not prepared to go into a trial of his cause, and was consequently taken by surprise; on this ground then he should have had a new hearing. *Graham on New Trials*, 168.

3. The third ground for error is, "that the court below erred in ruling out the deposition of Francis P. Beck, offered as evidence on behalf of the plaintiff."

The objection made on the trial to the deposition was on the ground of interest on the part of the deponent Beck.

The court clearly erred in not letting in this evidence; but one doubt could arise, and that would not be the admissibility of the evidence, but the credibility of the witness. Greenl. on Ev. (Ed. 1844,) 456, sect. 387; *Ib.* sect. 416 to 420.

Mere interest in the question would not render the evidence inadmissible. *Judge of Probate v. Green*, 1 How. 146; *Clapp v. Mandeville*, 5 Ib. 197.

The facts disclosed by the deposition show that the only interest which the witness could possibly have had in the case at bar was that he might be sued for negligence in this consignment; this interest then was certainly very remote and not in the event of the suit; for if the plaintiff failed in this action he could not have recovered against Beck or his partner, who were not parties to this proceeding.

Was this interest, then, if he had any interest in the controversy whatever, vested and certain? If not, the rule of law authorizes the admission of his evidence. See, on this point, Phillips on Ev. 46—69; 4 Johns. R. 128; Peake, 171; 1 Starkie, 97; 2 East, 489; 7 Green. 480; 2 Mass. 108; 1 Bibb, 298.

What is the fact, however? That the witness was the factor and agent of the plaintiff; that as consignee he received the boxes, and re-shipped them. Does he not then stand disinterested between the ship-owners and the steamboat? and in fact as to all parties? If so, he is equally interested; his interest is balanced. If then his interest in the matter was equally balanced, his testimony was competent.

The case of *Austin v. Feamster*, 1 S. & M. 166, decides this question as to the competency of witnesses who are equally liable; the same principle is sustained by the following authorities: 3 Dallas, 506; *Bailey v. Johnson*, 3 Johns. 420; *Baring v. Reeder*, 1 Hen. & Mun. 164.

The witness Beck was nothing more than an agent of the plaintiffs, and if only an agent, his testimony was entirely competent. See the case of *Austin v. Feamster*, and the cases referred to above.

But the law-writers go farther, and say, that in order to ex-

clude testimony on the ground of interest, such interest must be in the verdict, in the judgment had in the cause, and this certainly is the reasonable and correct rule. There is no use in elaborating the argument on this point, the authorities are numerous. See *Wakely v. Hart et al.* 6 Bin. 316; 1 Yeates, 84; 1 Hay. 2, 4 Mass. 448; 2 Phil. Ev. (Cow. & Hill's notes,) 92, 98, note 88, 91.

It may be said that the witness says he believes that he is interested, and therefore his evidence must be refused, but that is not a good reason; he may believe firmly that he is interested, and yet if he really has no interest, the evidence will not only be competent to go to the jury, but its credibility will not be affected by such belief. Green. on Ev. (ed. 1844,) p. 456, sec. 337, 416 to 420.

If a judgment had been rendered against the defendant, and the defendant brought an action against Beck, could this judgment be offered as evidence in the cause? Certainly not, for a judgment is never evidence in favor of or against a person unless they were parties to it. See *Copp v. McDougall*, 9 Mass. 1; *Perkins v. Pitts*, 11 Ib. 125; 14 Ib. 222; *Shrewsbury v. Boylston*, 1 Pick. 105.

This deposition could not be read in any other case, either for or against Beck; it could affect no other cause but the one in which it was taken. Then upon this point it was competent.

George L. Potter, for defendant in error.

Neither of the causes assigned for error is a cause to reverse the judgment; they relate to matters to which the bill of exceptions does not refer; the exception is to the refusal of a new trial, the causes assigned refer to the action of the court at and before the trial, to the refusal of a continuance, and the ruling out a deposition. Suppose the reasons assigned on the motion for a new trial had been stated in the assignment of errors as specifications why the refusal of a new trial was error, still no error would be shown.

1. There is nothing to show the verdict was contrary to law or evidence.

2. The refusal of a continuance cannot be assigned for error. The declaration was filed to May term, 1841, the trial was at May term, 1844, yet there was no showing why the deposition had not been taken before, nor any showing that the testimony of the witness was material; the so-called deposition, set out in the bill of exceptions, cannot be regarded as an affidavit to show such materiality, for the statement of the witness was not taken under the authority of a commission, and there is nothing to show that Christie was authorized to administer an oath.

3. The ruling out the statement of Beck was not error. First, because that so-called deposition was not taken pursuant to the statute; there was no commission to authorize Christie to examine Beck. Second, no notice of the time and place of taking it was given to Thomas R. Lee & Co. as had been agreed by the counsel on both sides; the notice alleged to have been given, was to Henry R. Lee & Co. Third, there is nothing to show the interrogatories were ever filed in the clerk's office; no evidence that the examination was taken by a person authorized to take it and to swear the witness; nothing to show that this so-called deposition was sealed up and directed or deposited and opened in court as the statute directs. How. & Hutch. 603, § 16, 17.

4. All the material direct interrogatories are leading questions. The shipment of the goods on board the Baton Rouge was the material fact to be proved; the question to this point is one to which "the answer yes or no would be conclusive;" it was therefore clearly objectionable. 1 Stark. Ev. 150. The other direct interrogatories refer to this, and must fall with it. Under our statutes, this objection may be taken at the trial. How. & Hutch. 603, § 16.

5. The witness was interested to subject the defendants to a verdict for the value of the goods. He admits that he received the goods into his possession, as the agent of the plaintiff, and that the goods were then in good order; unless he could show that he delivered the goods in the like good order, he would be liable to the plaintiff; hence his statement that he was inter-

ested "in proving that goods were not taken out of the said boxes whilst in New Orleans." "Where a witness is so far interested in a fact upon which the verdict depends, that if his party failed, and the fact were contrary to his testimony, he would be liable to that party," he is clearly *incompetent*. 1 Stark. Ev. 110, *et seq.*; 1 Green. Ev. § 393, 396, 417. Such an interest does not merely affect his credibility. In this case there is no pretence to say the witness was "disinterested between the parties;" he was not the agent of, nor would he be liable over to the defendants.

6. The witness had no recollection that he shipped the boxes, but was induced to swear that he did ship them, because the bill of lading was filled up by him; that is to say, he swore to a mere memorandum. Where a witness so swears, the memorandum itself should be produced and identified. 1 Stark. Ev. 154; 3 Phil. Ev. (Cow. & Hill) 1238; the bill of lading was not produced.

These defects in the so-called deposition are apparent on the record, and they fully justify the exclusion of that document. As the record does not state the very reasons why this paper was rejected, this court would presume it was properly ruled out; that it was not taken, returned, filed or opened pursuant to statute, or that it was improperly opened out of court; the fact that the learned counsel for the plaintiff, after taking this so-called deposition, found it necessary to file the same interrogatories to retake the testimony of the witness, creates a very strong presumption that this rejected statement was properly refused.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

The plaintiff instituted this suit by attachment against the Steamboat Baton Rouge, (not knowing the name of the master or owner) according to the statute, for damage to three boxes of merchandise, which had been shipped on the boat at New Orleans, directed to the plaintiff at Natchez. The goods, it seems, were originally shipped from New York, and re-shipped at New Orleans. The deposition of the commission merchant

who re-shipped the goods, was taken by the plaintiff, but ruled out on the trial, and, after verdict for defendant, the plaintiff moved for a new trial, first, because an application for a continuance had been refused, and second, because the deposition was improperly excluded.

An application for a continuance is addressed to the discretion of the court, and if it be refused, cannot generally be assigned as error. But the plaintiff did not make a sufficient showing to entitle him to it.

It does not appear by the record on what ground the deposition of Beck was ruled out; the only light we get on this subject is from the arguments of counsel. It is admitted that a commission issued, and, in connection with this admission, the cross-interrogatories filed by the defendants, would justify a presumption that it was regularly issued. But there was an agreement entered into between the counsel for plaintiff and defendant, which imposed conditions that have not, as it is said, been complied with. By this agreement the counsel of both parties consented that a commission might issue forthwith, without affidavit, and that one day's notice should be given of the time and place of taking the deposition, to Thomas R. Lee & Co. No. 7, Magazine street, New Orleans. This notice was given to the firm of Henry R. Lee & Co. and one of the firm attended the taking of the deposition. As cross-interrogatories had been filed, we see no motive which could have induced the insertion of this condition, unless the firm mentioned had an interest in the suit. If so it was competent for their counsel to make this provision in their favor. The notice, however, was not given to Thomas R. Lee & Co., but to Henry R. Lee & Co. No doubt proof might have been introduced to show that the latter firm was intended; that would have left the deposition unobjectionable in this particular. But we cannot know that the notice was required to be given to Henry R. Lee & Co.; there may be a firm in New Orleans under the name of Thomas R. Lee & Co.

But the judgment in this case may be placed on a ground less questionable. It comes up by bill of exceptions, taken under

the statute to the decision of the court, in overruling a motion for a new trial. In such cases the judgment may be reversed, because of the improper ruling of the court below, or because the evidence greatly preponderates against the finding of the jury. To enable us, therefore, to decide properly, the evidence, or the substance of the evidence, ought to be set out in the bill of exceptions; otherwise it is defective. *Terry v. Robins*, 5 S. & M. 291. In cases brought up in this way, a new trial will not be granted unless it is clear that justice has not been done in the court below. *Leflore v. Justice*, 1 S. & M. 381; or when it appears that the jury found according to the weight of evidence. *Jenkins v. Whitehead*, Ibid. 157; or where there is little reason to suppose that a different result would ensue on another trial. *Barrenger v. Nesbet*, Ibid. 22. The suit is for damage done to the boxes of merchandise, either by the abstraction of part of the goods, or for permitting them to be injured on the passage. This is manifest from the declaration, and from the deposition of Beck. The record contains no proof of the condition of the goods when received. The only evidence set out in the bill of exceptions, is the rejected deposition. Suppose it had been received, would it have produced a different result? It proves nothing, except that six boxes of merchandise were shipped on the Baton Rouge to defendant, at Natchez. It says nothing of the kind or value of the merchandise. How was it possible for this evidence to have justified a verdict for the plaintiff for the amount claimed, or indeed for any amount? There was probably other evidence before the jury, but it is not before us. We must try the verdict by the evidence which is set out in the record, and even if the deposition had been admitted, we do not see how it could have changed the result.

Judgment affirmed.

THACHER, J. having been of counsel below, gave no opinion.

ROBSON & ALLEN vs. BENTON & MANCHESTER RAILROAD & BANKING COMPANY.

The rights of parties must be determined, according to the law, as it stood when the suit was commenced and process served; if, therefore, a party is entitled to relief at the time he institutes his suit, nothing which subsequently occurs, without his instrumentality, can deprive him of that right.

The act of 1840, requiring all banks in this state to receive their own issues in payment of all debts due to them, when attempted to be applied to the creditors of the banks, is in derogation of common right, and must be strictly construed; where, therefore, the judgment creditors of a bank filed a bill against the bank, and the judgment debtors of the bank, after an execution on their judgment against the bank had been returned *nulla bona*, praying that the judgment debtors of the bank be required to pay the amount of their judgment against the bank; it was *held* that the complainants were not bound to receive the issues of the bank, or anything but gold and silver in payment of their debt. If the debtors to the bank had offered to pay the bank, or had been in readiness to do so by the possession of the notes of the bank, before the filing of the bill, the rule would have been otherwise.

By the act of 1840, the banks in this state were prohibited from transferring their evidences of debt, and were required to receive their own issues in payment of all debts due them; but if a bank do transfer a note and the assignee institute suit thereon in his own name, and the defendant fail to plead the transfer in abatement, he will be held to have waived his right to object to the transfer, and will be compelled to pay in gold and silver.

R. & A. having obtained a judgment against the Benton Bank for \$1573, and the bank being insolvent, they filed their bill on the 22d day of May, 1840, to subject a judgment which the bank had recovered against Y. and others for \$1266, to the payment of the judgment in their favor against the bank, and enjoined Y. and others from paying their debt to the bank; at the time the injunction was granted, the notes of the bank were worth only fifty-six cents on the dollar; *held*, that R. & A. could not be compelled to receive the issues of the bank in payment of their debt; but inasmuch as Y. and others, under the act of 1840, had the right to pay the bank in her own issues before they were enjoined from doing so, the value of those issues at the time they were enjoined should constitute the measure of their liability; and therefore they were entitled to a credit of one dollar, on their debt to the

Robson & Allen v. Benton & Manchester Railroad & Banking Co.

bank, for every fifty-six cents they were required to pay R. & A. ; and they could not in equity be compelled to pay more than would, at that rate, be sufficient to discharge their indebtedness to the Bank.

On appeal from the superior court of chancery ; Hon. Robert H. Buckner, chancellor.

On the 22d day of May, 1840, James M. Allen, Richard H. Allen, and James I. Robson, who were co-partners under the name and firm of Robson & Allen, filed their bill in the superior court of chancery, alleging that, on the 7th day of December, 1839, they recovered a judgment, in the circuit court of Yazoo county, against the Benton and Manchester Railroad and Banking Company, for the sum of fifteen hundred and seventy-three dollars and twenty-nine cents, and costs of suit ; upon which a writ of *feri facias* was regularly issued, and returned by the sheriff, "no property found;" and that the bank had no property on which a levy could be made ; that on the first Monday of May, 1840, the bank, by the forfeiture of a forthcoming bond, returnable to the Yazoo circuit court, obtained a judgment against Burton Yandell, James R. Burrus, William M. Yandell, Philip J. Burrus, James Morton, John M. Sharpe and William C. J. Burrus, for the sum of four thousand two hundred and ninety-six dollars and seventy-eight cents, which remains in full force, and unsatisfied ; that if permitted to collect this sum or judgment, she will fraudulently appropriate it to some other purpose than the payment of the judgment in favor of complainants.

The Benton and Manchester Railroad and Banking Company, Burton Yandell, James R. Burrus, William M. Yandell, Philip J. Burrus, James Morton, John M. Sharpe, and William C. J. Burrus, were made defendants, and the prayer was for an injunction ; and that Burton Yandell and others be decreed to pay the judgment in favor of complainants against the bank, and for general relief. Upon this bill an injunction was granted by the Hon. John Battaile. The bill was taken for confessed against the bank. The other defendants answered, admitting all the allegations contained in the bill ; but averring that about nineteen hundred dollars had been paid by William M. Yandell on the

judgment recovered by the bank against Burton Yandell and others; and that, in 1840, an act was passed by the legislature of the state of Mississippi, and approved on the 22d day of Feb., 1840, by which it was provided that all banks in this state should at all times receive their respective notes at par in the liquidation of their bills receivable, and other debts due them; that Benton Bank had many notes in circulation, which were much under par, and they had the right to pay their debt in such notes; that they had no objection to paying such notes, or their value, to be ascertained by the court, to the complainants at such time and in whatever manner the court might direct, provided the bank was decreed to credit them with the amount so paid, or be enjoined from collecting it from them; and they offered to pay the bank notes, or their value, as the court might direct. On the 13th day of January, 1842, the same defendants, by leave of the court, filed an amended answer, averring that the notes of the Benton and Manchester Railroad and Banking Company were only fifty-six cents on the dollar in par funds; and that they were perfectly willing a decree should be rendered against them for the value of the notes at that rate. On the 28th day of February, 1842, the cause having been submitted on the bill, answer and amended answer, *pro confesso* against the bank, and exhibits, the chancellor rendered a final decree, ordering the defendants, Burton Yandell and others, to pay to the complainants the full amount of their judgment against the bank, together with all interests and costs; that the bank be perpetually enjoined from collecting from them the amount they were required to pay to the complainants, and that injunction, as to the residue of the judgment in favor of the bank, be dissolved. In May, 1842, the defendants, Burton Yandell and others, by leave of the court, filed their bill of review, reciting the substance of the original bill, answers, exhibits, and the final decree rendered thereon, and averring that there was manifest error on the face of the decree, for which the same should be reversed; that by the terms of the decree they were required to pay Robson & Allen the sum of dollars in gold and silver, and were left at liberty to discharge the residue of the judgment against them in the

Robson & Allen v. Benton & Manchester Railroad & Banking Co.

notes of the bank ; that the act of the legislature, passed before the original bill was filed, guaranteed to them the right to pay off the judgment, recovered by the bank against them, in the notes of the bank, which were not worth, at the time of filing the original bill, nor then, more than sixty cents on the dollar ; that by the decree they were required to pay as much or nearly as much to Robson & Allen as the law required them to pay in discharge of their entire indebtedness to the bank. They further averred that in one of the answers filed to the original bill, it appeared that about the sum of eighteen hundred dollars had been paid on the judgment against them, before the injunction was served on them, and yet no notice was taken of that payment in the decree, and they were therefore, by the terms of the decree, compelled to pay it ; that they were most seriously injured by the decree, as they would not only lose irreparably the eighteen hundred dollars which had been paid before the injunction was served, but they would also lose the difference between the notes of the bank, and gold and silver, to the extent of the sum they were required to pay Robson & Allen. They further aver that the decree was obtained against them by direct fraud on the part of the former solicitor of Robson & Allen, and by a combination and conspiracy between him and the banking company, or their agent. They averred that the reason why no proof was introduced, on the hearing of the cause, of the value of the notes of the bank, was because there was a written agreement between the solicitor of Robson & Allen and James R. Burrus, that the notes of the bank were to be valued at fifty-six cents on the dollar, and scaled at that rate ; which written agreement the solicitor agreed to file among the papers in the cause and be governed by it as a fact proved ; that the agreement was not filed, and it was insisted at the trial that no proof was adduced of the value of the notes of the bank, and thus their rights were materially prejudiced. The prayer was, that the former decree be reviewed and corrected in such manner as was consistent with equity and good conscience ; and that all proceedings be stayed on the former decree until the final hearing, &c. The answer of Robson & Allen to the bill of review

denied that there was any error in the former decree; they stated that they did not, of their own knowledge, know anything of the proceedings and steps taken by their solicitor; but they were informed by him, and believed, the charge of fraud made in the bill of review was utterly unfounded and untrue; that no such agreement as that specified in the bill of review or in any other form or shape, was at any time entered into; that the cause went fairly to trial, and no advantage was taken by their solicitor in any way of complainants. Respondents averred that they were informed and believed that if the eighteen hundred dollars, mentioned by complainants, had ever been paid at all, it was after the service of the injunction, and paid as a favor to the cashier of the bank, and with the view of defrauding respondents; that there was no evidence offered of such payment, and the court did not err, therefore, in not allowing it.

The deposition of William M. Yandell, taken by the complainants, proved that deponent, on the 17th day of April, 1840, paid John J. Michie, collecting attorney and agent of the Benton and Manchester Railroad and Banking Company, the sum of eighteen hundred dollars, in part satisfaction of the judgment recovered by the bank against Burton Yandell and others mentioned in the original bill; that at the time of making the payment he had not been served with the injunction at the suit of Robson & Allen; the notes of the bank were worth about sixty cents on the dollar at that time, and had ranged from fifty to sixty cents on the dollar ever since. Being cross-examined he said he paid the eighteen hundred dollars in the notes of the Mississippi Union Bank; that he knew at that time suit had been talked of, but he did not know that an injunction had been served on John J. Michie. The deposition of James R. Burrus, taken by complainants, proved that the injunction was sued out by his instigation; that he employed William E. Anderson to write the answer of defendants to the original bill, and after the death of Judge Anderson, in the fall of 1841, James R. Clark, the solicitor for Robson & Allen, had repeated conversations concerning the suit, and it was ultimately agreed that the notes

of the bank were worth fifty six cents on the dollar ; that Clark wrote the amended answer of the defendants filed in the cause, and he signed it, Clark agreeing that it was unnecessary to adduce proof of the value of the notes of the bank, as he would admit the amended answer as proof for *scaling* the notes ; that the agreement was not written out because deponent believed Clark did not want more than a conversion of the notes of the bank into good money, which he believed he could make out of the defendants after the notes were scaled according to agreement ; that it was further agreed between Clark and deponent, that the payment of eighteen hundred dollars made by William M. Yandell should be allowed ; and the notes of the bank should be scaled at fifty-six cents on the dollar, and the defendants should make no further resistance to a decree ; and that he did not therefore employ any other counsel, after Judge Anderson's death, to defend the case. On cross-examination he said if the name of Robert Hughes was marked as counsel for the defendants it was not at his request, and he did not think it was ; that Judge Hughes, however, was a partner of Judge Anderson, and the firm name might have been subscribed to the answer of defendants, though he never consulted the firm on the subject.

The deposition of James R. Clark, taken on behalf of the defendants, proved, that he was the sole solicitor employed by Robson and Allen, and that he employed R. S. Holt to argue the cause for him and obtain a decree ; that he never entered into any such agreement as that spoken of in the deposition of James R. Burrus, and never intended, from the commencement of the suit, to waive any legal advantage or dispense with any proof it was incumbent on the defendants to make, as he did not consider that he had any right to do so ; that he never agreed to admit the payment of the eighteen hundred dollars, for he always believed the payment was made after the service of the injunction ; and that the charges of fraud and conspiracy made in the bill of review, were utterly without foundation in fact.- On being cross-examined he said he never agreed that the notes of the bank should be valued at fifty-six cents on the dollar ; that he proposed the amended answer of the defendants to James

Robson & Allen v. Benton & Manchester Railroad & Banking Co.

R. Burrus and wrote it for them, and James R. Burrus signed it; that his reason for proposing such an amendment to his answer was, that he was doubtful at that time upon whom the burden would lie to prove the value of the bank notes, and he wanted the amended answer because he knew that would be evidence for complainants, but not for the defendants; that he wanted the evidence for the complainants only out of abundant caution; that James R. Burrus frequently spoke to him about the payment of eighteen hundred dollars, but he never agreed to admit it, or to dispense with any proof. In this condition the case was submitted to the chancellor who rendered a final decree reversing the former decree, and ordering that the defendants in the original bill be permitted to pay off the debt to Robson and Allen in the notes of the bank; and that the injunction be dissolved. From which decree Robson and Allen appealed to this court.

R. S. Holt, for appellants.

The defendants, on the trial of the original cause, insisted on a right to pay the judgment against them in the notes of the bank under the provisions of the act of 1840. See Sheet Acts, p. 22. But as they did not allege that they held or owned the notes of the bank, either when the attachment was served on them, or at the trial of the cause, the chancellor did not esteem them entitled to the benefit of the provisions of that act, which he construed as merely guaranteeing to them the right of set-off. They did not bring themselves within the provisions of that act, in the estimation of the chancellor, because they failed to allege the fact constituting the first essential of a right of set-off, i. e. that the party claiming it was the owner of a counter claim. This construction of the act of 1840, is the only one which can legitimately be given to its language, and has in fact received the authoritative sanction of this court. 2 S. & M. 606, 641.

The act of 1842, Sheet Acts, 140, was approved but three days before the original decree was signed, and was then unknown alike to the chancellor and to the counsel engaged in

the cause. This act, providing that in all cases where a debtor of a bank shall be garnisheed, the judgment shall be against him for the notes of the bank alone, was mainly relied on by the complainants in the bill of review to sustain them in the position that the original decree was erroneous in requiring of them good money. And the chancellor, in his opinion delivered from the bench, placed his reversal of the original decree on this ground alone.

The chancellor thus construed this statute as operating retrospectively for four purposes.

1st. To defeat the unquestionable right of the complainants, by the laws existing at the date of their contract with the bank, to attach the debts due to the bank, and demand payment from her debtors in good money.

2d. To defeat the right of complainants, under the laws in force when they contracted, to subject, in satisfaction of their debt, all the property, real and personal, in possession and in action, which belonged to the bank.

For if complainants, by attaching the debts due to the bank, can obtain nothing but the bank-notes which they had before they commenced suit, it is flagrantly manifest that that portion of the property of the bank which consists in choses in action, is entirely withdrawn from their reach.

3d. To defeat the suit of complainants commenced long before its passage, and having for its object the enforcement of the right which they had under the then existing laws to demand good money from the defendants.

4th. To defeat and annul the judicial transfer of the debt due to the bank, to complainants, which resulted, as a legal consequence, from the levy of the attachment on that debt. That the levy of the attachment operated as a judicial transfer of the debt to the complainants is shown by numerous authorities. 2 S. & M. 675; 6 Mun. 176; 2 Bay's R. 272.

This construction of the statute is wholly inadmissible, because it violates the long-established and inflexible rule "that no statute is to be construed as operating retrospectively, so as to take away a right vested, or defeat a suit commenced before

Robson & Allen v. Benton & Manchester Railroad & Banking Co.

its passage. *Dash v. Van Kleeck*, 7 Johns. R. 477; 6 Paige Ch. R. 323; *Davis v. Minor*, 1 How. R. 184.

The law existing at the date of a contract, constitutes as much a part of it, as does the language used by the parties in giving expression to their meaning. And there is no part of the law of the contract to which the parties so constantly and necessarily have reference as that which determines what portion of the debtor's property the creditor may subject to the payment of his debt, and the remedies which he may avail himself of in so subjecting it. The right of the creditor to avail himself of all the rights conferred by the law of the contract is a distinct, positive and vested one. Any statute then which aims at withdrawing from the reach of the creditor, either the whole or any part of the property of the debtor, which was not exempted by law at the date of the contract, or at rendering the remedies otherwise less productive and effective than those given by law when the contract was entered into, not only conflicts with the important rule which I have stated, but is obnoxious to the objection that it impairs the obligation of the contract. 4 Litt. R. 47; *Ibid.* 34; 8 Wheat. R. 1, 75, 76, 84; 1 How. U. S. R. 311; 2 *Ibid.* 608.

The construction of the act of 1842, adopted by the chancellor, was, we think, for these reasons, and in view of these authorities, unsound.

The fraud of the attorney of complainants, relied on in the second place to support the bill of review, is not proved. It is distinctly negatived by the testimony of Clark himself, whose recollection of the transaction was manifestly clear and satisfactory, and is but feebly and doubtingly sustained by the testimony of Burrus.

That more confidence is to be placed in the memory of Clark than of Burrus, is evident from the fact that the latter testified under the bias of strong interest; and moreover, in his deposition contradicts the allegation of the bill of review to which he had himself sworn. In the bill of review he says that the alleged agreement entered into between him and Clark was reduced to writing and handed to Clark, who promised to

Robson & Allen v. Benton & Manchester Railroad & Banking Co.

file it. But in his deposition he says the agreement was not reduced to writing, because he confided in the integrity of Clark.

This important discrepancy shows that his recollection of the transaction is much too fluctuating and clouded to be relied on.

Another very obvious answer to this ground taken by the bill of review, is, that the facts in relation to which the agreement is alleged to have been made, were wholly immaterial, and their admission could not have influenced the decision of the cause.

William R. Miles, for appellees.

Should the last decree be affirmed, or reversed? I insist it should be affirmed: Because the act of 1840 compels all banks in this state to receive their *own notes* in payment of debts due them. Under no circumstances could the bank in this case recover anything else than its *own notes*. The original bill having been filed to subrogate Robson & Allen to the *rights of the bank*, it is plain, upon the most familiar principles of law, that they cannot be placed in a better condition than the bank in whose condition they are put by the decree. The person who claims to be subrogated to the rights of another, cannot occupy any ground more favored in law than he to whom those rights at first belonged. 9 Cranch, 500; 1 Johns. Ch. R. 412; 2 Ibid. 554; 4 Randolph's R. 444, and cases cited.

Now I most respectfully urge that, inasmuch as Robson & Allen, by the decree of substitution, "stand in the shoes" of the bank, they can ask nothing, but what could have been successfully demanded by the bank. The original decree should have been drawn in such manner as to authorize the defendants to discharge the demand due Robson & Allen, in the notes of the bank; or, compelling them to pay Robson & Allen the amount due them, to be discharged in the notes of the bank, at fifty-six cents to the dollar; that being the amount which is stated in the answer to be their value. Acts of 1842, 140, 141.

The parties in this cause are willing, nay, they are anxious to pay this debt; but they do protest most earnestly against a repeal of the statute by a decree of this court, compelling them to pay it in *gold and silver*; when by law they are entitled to pay it in the notes of the bank, at little more than fifty cents to the dollar. The law clothes the defendants to the "original bill" with full power to pay their debt due to the bank in the *notes of the bank*. Who shall undertake to deny them a right guaranteed by the law? By the act of 1840 the banks are forbid the transfer of their bills receivable, with the view, doubtless, and for the purpose of giving their debtors a chance to pay up their liabilities in the notes of the banks. Can this court, then, decree a transfer, and authorize a collection of the claim thus transferred, in *gold and silver*, when the owner of the claim could not do it? It is thought not. 2 S. & M. 615.

It may be insisted that a decree cannot be rendered, *scaling* the bank notes, without materially injuring the interest of the bank. Be it so. The defendants to the original bill have no concern with that question. It is an affair between the bank and Robson & Allen. All my clients ask is, to have the privilege of paying their debt in the manner authorized by law. Acts of 1842, 140, 141.

Thus much for the error apparent on the face of the first decree. Aside from which, I insist that the papers in the original cause, the bill of review, and proofs accompanying it, show sufficient grounds for setting the first decree aside. The original bill states that the judgment in favor of the bank against Sharp, Burrus, Yandell and others, was in "full force and unsatisfied." The answer denies it, and states that about \$1900 had been paid. And yet the solicitor took a decree to pay that sum *again*. This, connected with the fraud alleged in the bill of review, and proved by the deposition of Burrus, would be sufficient to set the decree aside. 3 Bro. Ch. R. 79; 1 Sch. & Lefr. R. 355 - 375; 1 P. Wms. R. 736, 737; 3 Ibid. 111.

Mr. Chief Justice SHARKEY delivered the opinion of the court. The complainants had recovered judgment against the Benton

Robson & Allen v. Benton & Manchester Railroad & Banking Co.

Bank for the sum of \$1573, and as the bank was insolvent, after the return of an execution this bill was filed to subject the amount of a judgment which the bank had recovered against Burton Yandell, James R. Burrus, William Yandell, Philip J. Burrus, James Morton, John M. Sharp, and W. C. Burrus, for the sum of \$4266, to the payment of the judgment in favor of complainants. There seems to have been no further resistance than that Yandell, Burrus and others insisted that they had a right to make the payment in the notes of the Benton Bank, and accordingly in their answer, after averring that \$1800 had been paid, they insist upon the right to pay the notes or their value, they being greatly depreciated; but the chancellor thought otherwise, and made a decree against the respondents for the full amount of complainant's judgment, to be paid in money. By an amended answer, it is averred that the notes of the Benton Bank were worth only fifty-six cents in the dollar.

The respondents afterwards filed a bill of review to reverse the decree on the ground that they were improperly required to pay Robson & Allen, in par funds, the full amount of their judgment, claiming the right to pay the amount as though the payment was to be made to the bank. They also object to the decree because no notice was taken of the payment of \$1800, in consequence of which omission they say they may be again compelled to pay it. And they also aver that the attorney for complainants in the original bill had agreed to admit that the notes of the bank were worth but fifty-six cents in the dollar, and that the payment of \$1800 had been made, in consequence of which agreement they omitted to introduce proof on these subjects. The bill of review was sustained, and a decree according to the prayer.

No objection has been taken to the right of complainants in the original bill to pursue this remedy, nor has the right of respondents to file the bill of review been questioned in such a shape as to call for special notice. Without therefore approving or disapproving the one or the other remedy, we will proceed to the merits of the controversy, on which alone do the parties rely.

The complainants commenced this proceeding on the 22d of May, 1840, and on the 28th of February, 1842, the final decree was rendered on the original bill.

From the foregoing statement it will be seen that the subject of controversy is whether Robson & Allen are entitled to receive from the respondents the amount of their judgment in money, or par funds, or whether they are to be placed in the shoes of the bank, and must receive its notes in payment. The several statutes in relation to the privileges of bank debtors, and the duties of the banks, are relied on to control the decision. By the act of 1840, all banks in this state are compelled to receive their own notes in payment of their bills receivable and other claims, at their nominal value. By the act of 1842, the right to pay all debts due to the banks in their own notes is extended so as to entitle any one, garnisheed as a bank debtor, and also any one garnisheed by a bank, to pay in that way, and judgment can only be rendered to be discharged in the notes of the bank with which the debt was contracted, or to which it is transferred by the process of garnishment. If the act of 1842 had been in force when this proceeding was commenced, the matter would be plain enough, for although this is not a proceeding by garnishment, yet the analogy is complete. The act fixes the right of the bank debtor, and it cannot be varied by a change of remedy. But the act was passed and took effect on the 25th of February, 1842, but three days before the decree was signed, and although it was in force at the date of the decree, yet the rights of parties must be determined with reference to the law as it stood when the proceeding was commenced and process served. If the state of things at that time was such as to entitle the complainants to relief, nothing which subsequently occurred, without their instrumentality, can deprive them of that right. The decree should be rendered according to the rights of the parties as they stood at the beginning of the suit. To illustrate this, let us suppose the respondents had paid this debt to the Benton Bank after process served, such payment would not have exonerated them from liability to the complainants. In several cases very similar to this,

Chancellor Kent held that the rights of the parties must be determined as they stood at the service of process, and could not be changed by rights subsequently acquired or payments subsequently made. *Brinkerhoff v. Brown*, 4 Johns. Ch. R. 671; *Williams v. Brown*, Ibid. 682; *McDermot v. Strong*, Ibid. 687; *Spader v. Davis*, 5 Johns. Ch. R. 280. We may again refer to the analogy between this proceeding and the remedy by garnishee process at law, in which case the liability of the garnishee is governed with reference to the time the process was served. He must answer what he then owed, and the judgment is rendered accordingly. And here we may remark that the latter remedy would probably have been quite as appropriate in the present instance.

Aside then from the act of 1842, the question is, what were the respective rights of the parties under the act of 1840? The debtors, it is true, had a right to pay the bank in its own issues, or rather it was the duty of the bank to receive its own issues. The only right the debtors had arose out of this duty or obligation imposed on the banks, and not from any stipulations in the contract, or privilege positively granted to debtors by the act. But have the complainants a right to nothing more? If not, then they had no equity; their condition is made worse by compelling them to receive the notes. They started out with a judgment, or rather with a chose in action as the foundation of the judgment. The judgment is to be satisfied by the decree, and the decree by the promissory notes; so that after having pursued this round of litigation, they arrive at the end of it with their debt converted from one note to many. The act of 1840 is not, as we conceive, to be so construed as to produce such a result. The object of the legislature in passing the act, was doubtless to prevent the banks from coercing payment in gold and silver, and to compel them to receive as money, that which they had put into circulation as such, which had become greatly depreciated. The language of the act seems to look to the banks as the subject of the legislation; they were required to receive their own notes in payment. The debtor, to be sure, received a corresponding or consequential benefit, but this benefit

to him, was not the motive which operated on the legislature. The obligation to receive these notes is not extended to other persons, and the act does not call for a construction so liberal and extended as to embrace any payments except such as were to be made to the banks. When it is attempted to be applied to the complainants, it is in derogation of common right, and must be strictly construed. The legislature saw that the act would not work with uniformity as to bank debtors, and provided a remedy by the act of 1842. By the act of 1840 the defendant had the power to defeat an assignment by plea in abatement, the effect of which was that the banks could not transfer the collection of their debts to other persons; they were bound to make their own collections, and that too in their own notes. But a transfer by process of law was unprovided for until 1842. That the legislature made this provision in 1842, is evidence that it was by that body supposed that no provision had been made for transfers by operation of law. This bill is not founded on the doctrine of substitution. The complainants do not ask to be substituted to the rights of the bank, but they ask that a sum of money due the bank may be arrested from the process in favor of the bank, and applied to the payment of their debt, on that principle of equity which will induce a court of equity to lend its aid in enforcing judgments at law, by subjecting that which a court of law cannot reach, after a proper effort to reach it under process has proved ineffectual. A judgment creditor is entitled in this way to reach a debt due by judgment to his debtor, because he cannot so reach it at law. *Egberts v. Pemberton*, 7 Johns. Ch. R. 208. If courts of equity will thus interfere in order that justice may be done, they will not permit the remedy to work to the prejudice of the complainant, unless compelled to do so by some stubborn rule of law. These debtors had a right to pay the bank in its own notes, but they have now no right to pay the debt to the bank, even in that way: the debt has been transferred. It has fallen into the hands of parties who are under no obligation to receive anything but gold and silver, and if it can be paid in anything else, it must be in consequence of a right resulting to the debtors from the nature of the contract.

The law does not say that all contracts made with banks shall be so paid. To entitle debtors to this right it must be a claim due the bank when the party offers to pay. This is not now a debt due the bank, and to such we do not think the statute applies. If an offer to pay had been made, or even a readiness to do so by possession of the notes, before the transfer, the question would be different. Let us suppose that the note of these debtors had been transferred before suit brought, and to an action in the name of the assignee they failed to plead the transfer in abatement, by which they waived any objection to the transfer. The effect would be to make the transfer valid; could they afterwards claim to pay the judgment in the notes of the bank? We have just decided that they could not, and the principle of the two cases is very much the same. The only difference is that in one case the transfer is valid because it was not objected to, and an assent thereby implied, and in the other case it is valid by law. In either case it is not a claim due the bank, and is not within the statute.

But a question then arises as to the amount the debtors are bound to pay. They have been called into a court of equity, and have a right to claim its protection against a payment which may be beyond the amount which would have discharged their debt when they were enjoined from paying it. They cannot throw the risk of depreciation since that time on the complainants, and pay in a currency which may have become utterly worthless, but as they could have paid in such currency at the time the complainants right attached, the value of the notes at that time must constitute the measure of liability. That is the amount which equity may claim to appropriate. If the notes were worth fifty-six cents in the dollar, then they must pay the complainants fifty-six cents for every dollar they owed the bank, or at that rate on a sufficient amount to satisfy the complainants' demand, if they owe enough. In this way they lose nothing by the transfer. When they make this payment one dollar of the debt to the bank will be discharged by the fifty-six cents. The decrees were then both wrong. They must be reversed, and the cause remanded for further proceedings.

AMELIA M. WHITNEY and PENELOPE A. WHITNEY, Minors, by their next friend, Robert Stewart, junior, vs. MINOR M. WHITNEY.

W. filed her petition in the probate court, charging that her guardian, who was also her father, was habitually addicted to intemperance; habitually used profane and obscene language in the presence of his family, and permitted others to do the same; that he was fickle and petulant, at times harsh to his children, and always cruel to his slaves; was wholly destitute of business habits, wild, visionary, and reckless, in all his pecuniary schemes and transactions; was hopelessly insolvent, and wholly disqualified for the office of guardian; that he also suffered a member of his family to treat W. in a severe, harsh, and cruel manner; and the petitioner prayed that the letters of guardianship be revoked. The answer expressly denied the charges *seriatim*. Numerous witnesses were examined; some testified that W. was permitted to go thinly and uncomfortably clad, and had been seen with marks on her person, which were said to have been inflicted by her step-mother, the wife of her guardian; and that her guardian was not a fit or capable person to discharge the duties of his office; but most of the witnesses testified that the guardian was competent to perform the duties of his office, and was kind and affectionate to W. and dressed and educated her as well as his circumstances would justify: *Held*, that the petition should be dismissed.

The chancery rule, that an account will not be decreed, except upon an apparent indebtedness, does not apply to cases of guardians, when called upon to render an account in the probate court; it is the duty of a guardian, under the statute, to render an account annually; and a general statement, that the proceeds of the property in his hands was about equal to the expenses incurred in its management, is not such a report or account as is required by the statute.

ERROR, from the probate court of Amite county.

Amelia Maria Whitney and Penelope Angelina Whitney, minors, under the age of twenty-one years, by their next friend, Robert Stewart, junior, filed their petition in the probate court

of Amite county, stating that their maternal grandfather, William Lowry, by his last will bequeathed to their mother during her life, three slaves, named Chancy, John, and Zelia, to be equally divided at her death between the heirs of her body; that their mother, Penelope Whitney, died about the 15th day of August, 1834, leaving petitioners the only lawful heirs of her body; that on the 27th day of February, 1838, letters of guardianship were granted by the probate court of Amite county to their father, Minor M. Whitney, of their person and estate; and on the same day he returned to the probate court an inventory of their estate, consisting of five slaves, to wit: Chancy, and her children, John, Dorcas, Malsa, and Ann, valued at two thousand nine hundred dollars; that their father wholly failed to state any annual accounts as guardian, as required by law, or to make any report as to the management of the trust reposed in him, until the 28th day of June, 1842, and then he merely stated in substance that the use of the negroes was about equal to the support and maintenance of the lesser negroes and his wards; that their guardian had used and enjoyed the hire and services of the slaves, from the 15th day of August, 1834, down to the time of filing their petition, and the yearly hire of the slaves was worth at least three hundred dollars during all that time, amounting to the aggregate sum of two thousand four hundred dollars, exclusive of interest, all of which was in the hands of their guardian, wholly unaccounted for. Petitioners denied that their guardian, being their father, was authorized either in law or equity, to make any charge for their support and maintenance, without an express decree of the court to that effect, founded upon a just and true representation of his inability to maintain his children out of his individual property; that by the neglect and mismanagement of their guardian, four children, being the whole of the natural increase of their slaves, had died; and that they entertained a well-founded fear that ere they arrived at the years of maturity, their whole estate would be lost to them, if permitted to remain in the possession and under the control of their guardian. Petitioners charged that from a combination of causes their father was wholly dis-

Whitney et al. v. Whitney.

qualified for the office of guardian, either of their persons or property; that he was habitually addicted to intemperance; habitually used profane and obscene language in the presence and hearing of his family, and suffered others to do the same; his temper was fickle and petulant; at times he was harsh to his children, and always cruel to his slaves; was wholly destitute of business habits, wild, visionary and reckless in all his pecuniary schemes and transactions, and was notoriously and hopelessly insolvent. Petitioners stated that Amelia M. Whitney was in the fifteenth year of her age, and Penelope A. Whitney in her tenth year; that they did not charge that the ill-treatment of their father consisted in the commission of acts of cruelty, but rather in the omission of all the important duties of a father; they admitted, with filial pleasure, that their father generally manifested kind feeling, and something of a parental solicitude for their welfare, when uninfluenced by others; that about four years before that time he placed Amelia at a respectable female school in the town of Woodville, where her education and comfort were attended to for nearly two years; but since that time her education and comfort had been wholly neglected, and she had been subjected to cruelty and ill-usage by their stepmother, the present wife of their father; that she was thrown into a circle of society ill-suited to form her character in a proper mould, and at times she was so scantily furnished with clothing and other necessities suitable to her age as to render her situation humiliating in the extreme; that Penelope was taken by her maternal aunt, Miss Martha Lowry, immediately after the death of their mother, and has resided with her ever since, her aunt defraying, out of her own means, almost the entire expenses of Penelope; that her father had not paid for the education, maintenance and support of Penelope an average of ten dollars per annum. Petitioners further charged that their stepmother entertained towards Amelia the most embittered feelings; imposed on her the greatest hardships; had publicly slandered her character, heaped upon her the most opprobrious epithets, and used the most unfeminine means to injure her reputation and good

Whitney et al. v. Whitney.

name in society; and had threatened her publicly with still greater cruelties; she had even threatened to have petitioners removed beyond the limits of the state, and the reach and protection of friends; and that means should be taken to strip petitioners of their property and place it beyond the hope of recovery. They further charged that so great was the influence of his wife and her family over their father, that he either secretly approved their conduct towards petitioners, or feared to oppose her will, and shrank from the performance of his plainest duties to petitioners. They prayed that Minor M. Whitney be made defendant, and compelled to account with them for their slaves and the hire thereof, with interest; that his letters of guardianship be revoked, and that some other more suitable person be appointed guardian of their persons and estate, and for general relief.

Minor M. Whitney answered the petition, and admitted all the charges about his appointment as guardian, and the character and value of the estate of petitioners, but denied that the hire of the negroes was worth more than the taxes, physician's bills, and other necessary expenses incurred in the support and maintenance of the negro children and petitioners; and he denied *seriatim* any charge of cruelty, ill-usage, neglect, unkindness, incompetency, insolvency, or threatened cruelty, made in the petition, either against himself or his wife.

Numerous depositions were taken on both sides. Those taken on the part of the petitioners touching their treatment by the defendant and his wife, and the fitness and competency of the defendant to perform the duties of guardian of the persons and estate of the petitioners, proved in substance, that the petitioners were sometimes very thinly and plainly, though always decently clad, that they were sometimes treated harshly by the wife of defendant; but that defendant never seemed to approve, and sometimes complained of such treatment; and that on one occasion, marks were seen on the person of Amelia, which were said to have been inflicted by the wife of defendant. One or two of the witnesses considered the defendant an unsuitable and incompetent person to perform the duties of guardian of the

Whitney et al. v. Whitney.

persons and estate of the petitioners; but several other witnesses considered him perfectly competent to do so; that petitioners were not kept so constantly at school as some of the witnesses thought they ought to have been; and once when Penelope was sick, defendant only visited her once or twice. In relation to the slaves, Joshua Ballard testified that he hired Chancy and Dorcas for the year 1842, and he considered them worth that year about one hundred and forty dollars, and John was worth seventy-five dollars; he also said he considered the defendant competent to manage his property advantageously. On cross-examination, he said, from his knowledge of Chancy and her children, having a child as Chancy did almost every year, he did not believe they would have hired during the years 1838, 1839, 1840 and 1841, for more than their taxes, clothing, medical bills and support. William Jones proved that in 1842, John was worth eighty dollars, and that he considered the defendant a bad manager of property. William H. Spillman said that from 1835 to 1842, inclusive, Chancy was worth one hundred dollars per year; that in 1837, John was worth about forty-eight dollars, and from 1838 to 1841 inclusive, John was worth an average of sixty dollars a year; that from 1838 to 1842 inclusive, Dorcas was worth more than her support, but he could not say how much more she was worth; he thought the defendant capable of managing property to an advantage. On being cross-examined, he said that Chancy, in 1834, would have hired for one hundred dollars, the hirer paying for the clothing, medical bills, taxes, and feeding of herself and her four children, all under seven years of age. Samuel B. Moore testified that in 1834, Chancy with her four children under seven years of age, would have hired for forty or fifty dollars; that from 1835 to 1842 inclusive, he believed Chancy, with her children, was worth forty or fifty dollars per year, the hirer feeding and clothing her and her children, and paying their taxes and doctor's bills; that in 1835, John was worth about twelve dollars above ordinary expenses; in 1836, he was worth about twenty dollars; in 1837, thirty dollars; in 1838, forty dollars; in 1839, he hired for twelve dollars per month; in 1840, he was worth

Whitney et al. v. Whitney.

fifty dollars; in 1841, sixty dollars; and in 1842, he hired for eighty dollars; deponent considered the defendant capable of managing his own business. On being cross-examined, he said Chancy and all her children would have hired for forty or fifty dollars a year, since 1834, the hirer paying all their expenses, including taxes and physician's bills. O. W. Caulfield said he considered Chancy a valuable woman; but, in consequence of her having children so frequently, she was not as serviceable as she would otherwise have been. Being cross-examined, he said he was the family physician of the defendant, and he knew there had been a good deal of sickness in the family; that Mr. Whitney paid him for medical services, in 1835, sixty dollars; in 1836, thirty dollars; in 1837, thirty dollars; in 1838, eighty-four dollars; in 1839, thirty dollars; and in 1841, fifty dollars; that a considerable portion of his services were bestowed upon Chancy and her children, but he did not think one half of his services were bestowed on them. The defendant also read numerous depositions. George W. Lowry testified that the defendant had always, so far as he knew, exhibited the most parental and affectionate treatment towards the petitioners, Amelia and Penelope, since the death of their mother; that he always manifested every solicitude for their interest and welfare; that when sick, Dr. Caulfield or Dr. Cadwander was always employed to attend them; deponent knew Chancy and her children, and he supposed the expense of maintaining and supporting the smaller negroes about equal to the hire of the larger ones. On cross-examination, he said he knew the defendant had paid Dr. Cadwander for medical attention to Amelia and Penelope, twenty-five or thirty dollars, and he had also paid bills to Dr. Caulfield, but deponent did not know how much. Ezekiel Boatner testified that in 1836, he resided in the family of defendant, and knew the slave Chaney, and frequently saw her children, and he did not believe they were then worth more than their support; he considered the expense of feeding and clothing and raising a negro child, from its birth till it arrives at ten years of age, about twenty-five dollars a year; that a negro woman with a suckling child, during the

years 1835, 1836, and 1837, would hire for forty or fifty dollars a year less than a woman without one; that the defendant as far as he knew, always treated his slaves kindly and well. On cross-examination, he said he considered the slaves always suitably clothed by the defendant; that he did not think Chancy worth more annually than the support of her children; and he believed the defendant capable of managing and taking care of his property. John C. Anderson testified that he was frequently at defendant's house in 1835, 1836 and 1837, and was his partner in 1838, and he never knew Amelia to be mistreated; she was always dressed as well, and he sometimes thought better than the circumstances of defendant would justify; that he always thought the defendant treated his slaves as well as they deserved to be treated; they had plenty to eat and wear; from 1835 to 1842, he considered John worth an average of fifty dollars per year; that during the same years he did not believe the hire of Chancy and John would more than pay the expense of feeding, clothing, and raising Chancy's children; he considered all the children except John a dead expense; the expense of clothing, feeding and raising a child under seven years of age, he thought was about thirty-five dollars a year. On cross-examination, he stated that he considered the defendant capable of managing his property to an advantage, though he did not do so; he thought defendant would do justice to his own children, and administer their property honestly, though deponent would not have chosen the defendant as a guardian for his children. Jane Williamson testified that from 1835 to 1842, she had been very intimate in Mr. Whitney's family, sometimes residing in the family as long as eighteen months without leaving, and she never saw Amelia ill-treated, or heard that she was, and if she had been, deponent believes she would have heard of it; Amelia went to school the greater portion of the time, and was always very comfortably and well clothed. Eliza Cox proved substantially the same as Jane Williamson. T. G. Cowdin testified that he was a practising physician, and in 1841, visited and prescribed for Chancy and four of her children, at the request of the defendant, and was paid twenty-four dollars for his services by the defendant.

Whitney et al. v. Whitney.

On cross-examination, he said that he did not think he was the only physician who practised in the family of defendant, in 1841, though when defendant would leave home, he always requested deponent to attend his family, should any of them be taken sick; that he considered Chancy a very valuable and serviceable woman, and she was not often sick; he did not know whether defendant was a suitable person to act as guardian of minors, or not; but deponent would not select him as guardian for his children. Thomas W. Pound and George W. Rudd, each proved that Amelia had, at different periods, been a pupil in their respective schools, and she always appeared to be as well dressed as the other girls in the school.

Upon the foregoing pleadings and evidence, the cause was submitted to the court, and at the May term, 1843, a decree was rendered, dismissing the petition. To reverse that, this writ of error is now prosecuted.

Smiley and *Lowry*, for plaintiffs in error.

It is contended that the court of probate erred,

1st. In not compelling defendant to state an account as required by the 128th and 133d sections of the orphan's court law. (Revised Code, p. 66 and 68.)

2. The probate court should have removed defendant as guardian of complainants, and appointed a new guardian. (Revised Code, sect. 129, p. 67.)

The probate court law requires guardians to state *detailed* accounts annually. In this instance the law has not been complied with, and it was the duty of the probate court to compel the statement of an account and remove the guardian.

The father is bound to support his children, and cannot use their separate property for that purpose except by special order of the court. 2 Kent, 190.

The guardianship of children may be taken from the father when he neglects or ill-treats them.

McKnight, for the defendant in error.

There are two errors assigned by complainants why the decree of the probate court should be reversed.

1. As to the first assignment of errors; the bill of the complainants seeks to compel defendants to account for the hire of complainant's slaves from the death of their mother in 1834, previous to defendants becoming their guardian by appointment of the probate court, as well as for their hire since. From the bill, answer, and deposition, it appears that at the time of the death of Mrs. Whitney, the slaves descending to complainants were Chancy and her four children. It also appears that since then Chancy has had several other children. The testimony, when examined and collated, conclusively shows that the yearly expenses of maintaining these children of Chancy has been equal to her yearly hire, ever since the death of Mrs. Whitney, up to the time of the filing of complainant's bill. This is positively averred in the answer of the defendant. The guardian account of defendant, rendered in June, 1842, states this fact, and should be considered in reference thereto. Why then should the probate court have compelled the defendant to account? No indebtedness appeared to exist against defendant for the hire of the slaves of complainants. A decree to account should not be made unless an indebtedness appears. 1 Howard, 312.

2. As to the second assignment of errors; it does not appear either by the bill or in the depositions that the defendant had been summoned by the probate court to state a guardian account, which he refused to do. The 129th section of the orphan's court law referred to, requires the court to issue a summons to any guardian who neglects to state an annual guardian account, and if after being summoned; "he remain in default, his bond shall be put in suit and a new guardian appointed." It is not pretended that Whitney had been summoned by the court to state an account and "he remained in default." The bare fact of a guardian not stating an account annually, it is presumed is not of itself a sufficient cause to authorize the probate court to revoke his letters.

The guardian in this case has not pretended to use the separate property of his children, in their maintenance. His guardian account, stated in June, 1842, when considered in

Whitney et al. v. Whitney.

connection with the testimony, cannot be tortured into a charge against complainants of that nature.

The guardianship of children will not be taken from the father, unless he be guilty of gross immorality and ill-treatment. 2 Story's Eq. 574.

The court will not deprive a father of the custody of his child for immorality on the part of the father, unless misconduct on his part is shown with reference to the management and education of his child. 2 Eng. Cond. Ch. Rep. 299.

The charge of immorality and ill-treatment in the bill, is denied in the answer, and completely negatived by the testimony. See the testimony of Anderson, Miss Wilson, Mrs. Cox and others.

Mr. Justice THACHER delivered the opinion of the court.

This was a petition in the probate court of Amite county, filed by wards against their guardian to compel him to account, and for a revocation of his letters of guardianship. The petition sets forth that the grandfather of the wards had devised certain slaves to their mother and to her children after her death; that the complainants are the only surviving children of the mother, who died in 1834; that the defendant, who is the father of the complainants, obtained letters of guardianship over the wards in February, 1838; that the slaves had been and remained in the hands of the defendant since the death of their mother; and that the defendant, from his character, habits, and conduct, was unfit to be entrusted with their guardianship. The petition, besides a prayer for specific relief in the premises, contains a prayer for such relief as the nature of the case may require. The probate court, upon bill, answer and depositions, decreed the dismissal of the complainants' bill, and hence the cause is here upon a writ of error.

Upon a close examination of the evidence disclosed in the record, this court can see nothing to warrant it in disturbing the decree below so far as the charge of the unfitness of the defendant to discharge the duties of a guardian are concerned. The serious charges of the complainants in their petition are

explicitly denied in the defendant's answer, and there is a failure in the attempt to support them by evidence.

But upon the subject of the prayer for an account, this court is inclined to a different conclusion from that arrived at by the probate court. It is the duty of the guardian once in every year at least, to exhibit to the probate court an account of the product of the estate of the ward. H. & H. 337, § 7. The petition in the present case operates to summon the guardian into court to render his account, and it is upon his answer to that petition that he seeks to be relieved from rendering an account. The ground upon which he depends from being compelled to account is that there is no indebtedness between him and his wards, and this it is that constitutes the real inquiry in the cause.

The record shows that upon the 28th day of May, 1838, the defendant delivered into the probate court his inventory of all the estate of complainants, consisting of the following slaves, to wit; Chancy, aged twenty-seven years, valued at \$1200; John, eleven years, valued at \$600; Dorcas, six years, valued at \$450; Malsa, four years, valued at \$400; and Ann, nine months, valued at \$250. At the June term, 1842, the defendant made a report to the probate court, in which he states that since the May term, 1838, the services of the slaves had been about equivalent to the expense of the support of the younger slaves, and of the maintenance of the wards. This is an admission of the defendant that for a period of a little more than four years, the product of the slaves of the complainants had been equal to the expense of the maintenance of the complainants, as well as for the support of the younger children of the slave Chancy. The evidence contained in the depositions upon the subject of the yearly value of the family of slaves, although to some extent contradictory, shows sufficiently that their value was greater than the expense of their keeping. John Ballard, witness for complainants, testifies that Chancy and another slave not the property of complainants, were worth \$140 per year in 1842, and John \$75 per year, but he testifies that in the years 1838, 1839, 1840, and 1841, Chancy and her children could

not have been hired for more than their support, clothing, medical bills and taxes. William Jones, another witness for complainants, testifies that the boy John was worth \$80 per year in 1842. William H. Spillman, another witness for complainants, testifies that Chancy was worth \$100 per year from the year 1834 to 1842, and that John was worth \$48 per annum in 1837, and in the years 1838, 1839, 1840 and 1841, \$60 per annum. Samuel B. Moore, another witness for complainants, testifies that Chancy and her children, from 1834 to 1842, would net in value \$30 or \$40 per annum, and that the defendant acknowledged to him that in 1839 John was worth \$12 per month. He testified also, that in 1838 John was worth \$40, in 1840 \$50, in 1841 \$60, and 1842 \$80. Elijah Baxter, a witness for the defendant, testifies that Chancy and children were not worth more than the cost of their support, &c. in 1836 and the two previous years. John C. Anderson, a witness for the defendant, testified that upon an average, John was worth \$50 per annum from 1835 to 1842, and that during that time, the family of slaves, with the exception of John and Chancy was an expense rather than profit. Mrs. Eliza Cox, a witness of defendant testifies that Chancy was the principal cook in the hotel establishment of the defendant. Dr. T. G. Cowden, a witness of defendant, testifies that the defendant paid him \$24 for medical attendance upon the slaves in 1841. He testifies that Chancy is a valuable servant. The testimony of Dr. O. W. Caulfield, a witness for the defendant, upon an analysis, shows that the defendant paid him from the year 1835 to 1841 for medical attendance upon the slaves an average of not quite \$21 per annum. The foregoing extracts from the depositions of the witnesses contain the chief evidence respecting the annual value or product of the slaves, and upon a review of it, it is obvious that the position assumed by the defendant that no indebtedness in point of fact exists from him to his wards is not substantiated. It may be observed here, also, that the principle that holds in chancery that an account will not be decreed except upon an apparent indebtedness, does not apply in a case of this kind in the probate court. The statute makes it the duty of a guardian to render an annual account.

Whitney et al v. Whitney.

We are inclined therefore to hold, in this case, that under the prayer of the complainants for such further relief as the nature of the case may require, and upon the law and the evidence, the probate court should have decreed an account against the defendant from the time of his grant of letters of guardianship. The statement filed by the defendant at the June term, 1842, of the probate court, can be received merely as a bare statement, and not such a report as is required by the statute.

The decree of the probate court is therefore reversed, and the cause remanded to that court with directions that the petition and cause be there re-instated, and an account decreed as above.

WILLIAM B. ROSS vs. WALLACE WILSON, ANDREW WOODS, WILLIAM G. DOYLE, AND MARVEL M. GARREY.

Where a conveyance is made to sureties of the grantor, conditioned that the conveyance shall be void if the grantor pays the debt on which the grantees are sureties, otherwise to remain in full force and virtue, although the creditor knows nothing of the deed; yet as its provisions are for his benefit, his assent to it will be presumed, and the deed will be held to be not only as an indemnity to the sureties, but as a security for the debt; the sureties will be regarded as trustees for the benefit of the creditor, and will have no right to discharge or defeat the trust, unless it be to a purchaser for a valuable consideration without notice.

B. W. & Co. were indebted to R.; and W., one of the firm of B. W. & Co., gave his note with G. & D. as sureties thereon, for the payment of the debt. W. subsequently conveyed certain property to G. & D. on condition that if W. should pay the debt to R. and also a note due by W. to D., then the conveyance should be void; otherwise to remain in full force and virtue, which conveyance was duly recorded; B. W. & Co. were also largely indebted to W. W., and W. W. having obtained judgment against B. W. & Co., agreed with G. & D. to pay the debt W. owed D., if they would release all interest acquired by them under the conveyance to them by W., and they did so; and W. then conveyed the same property to W. W.; R. filed a bill to subject the property mentioned in the conveyance to G. & D. to the payment of his debt: *Held*, that the conveyance to G. & D. constituted them trustees for the benefit of R., and they did not discharge the trust by the release to W. W., he having notice of the debt to R.; but as the conveyance was also intended as a security for the debt due by W. to D., and as W. W. paid the debt to D., he ought, in equity, to be substituted to the rights of D.; that the property therefore should be sold, and the proceeds divided between R. and W. W., in proportion to the amount due R. and the debt W. W. paid to D.

Where a conveyance, intended as an indemnity to sureties and also as a security for the payment of the debt, describes the grantees as *indorsers*, when in fact they signed their names on the face of the note as *sureties*, the description will be considered as substantially correct.

Parol proof, in equity, is admissible to show that a mistake occurred in drawing an instrument, though it is to be received with caution and distrust.

APPEAL from the superior court of chancery; Hon. Robert H. Buckner, chancellor.

William B. Ross filed his bill in the superior court of chancery, charging that on the 1st day of March, 1838, the firm of Brown, Woods, & Co., being indebted to him, Andrew Woods, a member of the firm, gave him their promissory note for the sum of six thousand and sixty-seven dollars and seventy-two cents, payable on the 1st day of March, 1839, at the office of the Mississippi & Alabama Railroad Company at Brandon, with the names of William G. Doyle and Marvel M. Gary signed on the face of the note as sureties; that the debt having been sometime due, further time of payment was given with the express view of getting the debt well secured, and it was agreed that the note should be given with Gary & Doyle as indorsers thereof, and as a further security for the payment of the debt it was then also agreed that Woods was to execute a mortgage on certain real and personal estate, as complainant understood from his agent who transacted the business for him, and as he charged to be true; that in pursuance of such agreement Woods, on the 10th day of April, 1838, conveyed to Doyle and Gary certain lands and six slaves, conditioned "that if the said Andrew Woods shall, will, and truly pay, or cause to be paid unto the President, Directors & Company of the Brandon Bank, the sum of six thousand dollars, or thereabouts, being the amount of a certain note drawn by Brown, Woods & Co., dated in March, 1838, and payable twelve months after date in favor of William B. Ross, negotiable and payable at the Brandon Bank, on which note said Doyle and Gary are indorsers, and also a note drawn by Brown, Woods, & Co., payable to the said William G. Doyle for two thousand two hundred and ten dollars, due the 1st day of January last, on which is a credit of three hundred and fifty dollars; when the said note, first above specified, shall fall due, and the last named note on or before the maturity of the said first mentioned note, then this deed to be null and void; otherwise to remain in full force and virtue." Why the mortgage was made to Doyle & Gary, instead of being made direct to him, complainant did

not know ; but he believed and charged that the object was, by one instrument, to secure the debt due to himself, and also the debt due to Doyle ; that Doyle and Gary were, by mistake, described in the mortgage as indorsers, instead of joint makers of the note ; why it was said in the condition to the mortgage that the money was to be paid to the Mississippi & Alabama Railroad Company, complainant could not tell, but presumed it was because it was supposed he would have the note discounted at that bank ; that he never did have it discounted, but the whole sum being due and unpaid he instituted suit in the circuit court of Carroll county and recovered judgment thereon ; that an execution was issued on the judgment and returned "*nulla bona* ;" that all of the makers of the note were insolvent, and his only means of collecting his debt, or any part of it, is by recourse to the mortgaged property. Complainant charged that Woods being indebted to Wallace Wilson, and having no means of payment, he, Doyle, Gary & Wilson, combined together to defraud complainant of his lien on the land and slaves, and to appropriate them to the payment of the debt due by Woods to Wilson, notwithstanding Wilson had express and full knowledge of the mortgage, and that it had been duly recorded in Carroll county, where the property was on the same day it was executed, and that the debt of complainant was unpaid ; that to consummate their object, William G. Doyle, on the 24th day of June, 1839, and Marvel M. Gary, on the 26th day of the same month, by writing under seal, relinquished, or attempted to relinquish, the mortgage ; copies of the mortgage and release were filed, as exhibits to the bill, and Woods then sold the property to Wilson in accordance with the object of their combination. Complainant further charged that the whole of the property, at the current prices, would not be sufficient to pay his debt, and that the hire of the slaves and the rents and profits of the land would all be necessary to the satisfaction of his demand ; and that he verily believed Wilson, who had the property in possession, would sell or run the slaves out of the state, unless restrained. Andrew Woods, William G. Doyle, Marvel M. Gary, and Wallace Wilson, were made defendants, and the

Ross v. Wilson et al.

prayer was that a receiver be appointed to take charge of the land, and slaves, and rent and hire them out, and hold the proceeds of the rent and hire, subject to the order of the court, or if that could not be done that injunction issue restraining Wilson from removing the slaves beyond the jurisdiction of the court, and that he be required to give bond and good security for the delivery of the slaves whenever called on by the order of the court, as well as for the payment of the rent of the land and the hire of the slaves; and that the rent of the land and hire of the slaves be decreed to be paid to complainant; and also that the land and slaves be sold, and the proceeds applied to the payment of his debt. An injunction was granted by the Hon. R. H. Buckner, restraining Wilson from removing the slaves, and requiring him to give bond and security to have the slaves forthcoming to abide the order or decree of the court. William B. Ross answered, saying he knew nothing of the note or mortgage mentioned in the bill, and required proof of the allegations in reference to them; he admitted that Brown, Woods & Co. were indebted to William G. Doyle, as charged by complainant, and that Andrew Woods, on the 10th day of May, 1838, executed a mortgage to William G. Doyle and Marvel M. Gary on the land and slaves described in the mortgage, though he knew nothing of the object of the parties in making the mortgage, unless it was to secure the debt due to Doyle. Respondent admitted that Brown, Woods, & Co. were indebted to Wilson, Carpenter, & Co., of which firm respondent was a member, twenty odd thousand dollars; that they recovered a judgment for their debt, and were unable to collect the money by an execution at law, and respondent charged that they were about to institute suit to set aside the mortgage on the ground of fraud, and subject the mortgaged property to the payment of their debt, when Doyle became alarmed and came to respondent, admitted the mortgage was fraudulent, so far as complainant was concerned, and proposed to release the mortgage, provided respondent would pay his debt; respondent agreed to do so and did pay the debt to Doyle, and in accordance with his promise released the mortgage on the 24th, and

Gary released it on the 26th of June, 1839; and respondent then gave a fair and valuable consideration for the property described in the mortgage. Respondent admitted he knew of the existence of the mortgage, but denied that he knew the debt to complainant was unpaid; he denied all the charges of confederation or combination to defraud complainant or any body else, and every other charge of fraud made against him in the bill, and stated that his sole and only object of getting the mortgage released was to procure, if possible, a portion of his debt. Andrew Woods answered, and admitted that the firm of Brown, Woods & Co. were indebted and executed their note with Doyle & Gary, as securities thereon, for the amount and in the manner charged in the bill, and also that further time was given in consideration of security being given upon the note; but he denied that the mortgage was given or intended to be given, as a further security for the debt, to the complainant, or that such a thing was spoken of by the complainant or his agent, or thought of by respondent at the time the mortgage was executed; respondent admitted he executed a mortgage on the property, and at the time mentioned in the bill; but he denied that the complainant knew anything about its execution at the time, or that it was to be executed; and he denied that it was in any manner or way intended for the benefit of complainant; respondent averred that his sole and only object of executing the mortgage was to secure the debt of \$2210, due to Doyle, and indemnify Doyle & Gary against any loss they might sustain by their indorsements for the firm of Brown, Woods & Co., and that the note to the complainant was named in the mortgage, to prevent Wilson, Carpenter & Co. from selling the property under a judgment which they were then about to recover, and did recover the next day, for twenty thousand dollars, and upwards, against Brown, Woods & Co. Respondent stated that after the debt of \$2210 to Doyle had been paid and satisfied, and the mortgage released, he sold the property therein described to Wallace Wilson for a fair and valuable consideration, in discharge of an honest debt; he denied all fraud or combination with Wilson, Doyle, or any other person, with

Ross v. Wilson et al.

the design or wish to defraud the complainant or any body else. The answers of William G. Doyle and Marvel M. Gary were almost verbatim the same as the answer of Andrew Woods, the only substantial difference being the statement of Woods, that he sold the property to Wilson for a fair and valuable consideration, &c. The deposition of Ephraim R. McLean, read by the complainant, proved that deponent, as the agent of complainant, was about to institute suit against Brown, Woods & Co. and so informed Woods, and Woods agreed to secure the debt if suit was not brought and time was given to pay it; that he agreed to extend the time of payment twelve months, and Woods then made the note with William G. Doyle and Marvel M. Gary as sureties thereon, upon which the judgment in favor of complainant mentioned in the bill was founded; that it was also clearly his understanding, derived from the conversations of Woods, that Woods was to execute a deed of trust, on his individual property, to Doyle & Gary, as an additional security for the payment of the debt due to complainant, and he informed complainant that such was Wood's agreement; deponent further testified that after the mortgage was released he asked Gary why he executed the release, and Gary stated that his object was to prevent the property being sold for the payment of the debt due the complainant; and that Wilson also informed him that he had paid Doyle about two thousand dollars to release the mortgage. On being cross-examined, he said he was not interested in any way in the result of the suit; that at one time he made a verbal promise to complainant to pay one-half of the debt, but after the execution of the note upon which the judgment was founded he no longer considered himself in any manner bound for any part of the debt, and moreover the complainant had given him a full release; that neither Doyle or Gary was present when he conversed with Woods about giving security for the payment; Woods did not, in so many words, say he would give a deed of trust to complainant, but he said he had property sufficient to secure, and he preferred securing it in that way to being sued, and deponent understood that he was to give the deed of trust.

The deposition of Thomas B. Wadlington, read on behalf of the defendants, proved that deponent was present when the note given by Brown, Woods & Co. to complainant, or to his agent E. R. McLean, was executed; that the agent of complainant agreed to give twelve month's time on the debt, provided the note was satisfactorily secured; the indorsements of William G. Doyle and Marvel M. Gary were offered and accepted, and appeared to be satisfactory to Mr. McLean; and no other security was asked or offered; the note was written by Richard Small, Esq. On cross-examination, he said at the time the note was executed he was a member of the firm of Brown, Woods & Co. but he was not then, at the time his deposition was taken; that he had no interest whatever in the result of the suit, and he had no other interest in the note at the time it was given than to see it paid.

William G. Doyle, whose deposition was taken by the defendants, proved that he was present in 1837 or 1838, he thought, when E. R. McLean the agent of complainant, rode up to Andrew Woods and said he was on his way to Carrollton to institute suit against Brown, Woods & Co., but he agreed if Woods, or Brown, Woods & Co. would give a note payable twelve months after date at the Mississippi & Alabama Railroad Company, indorsed by deponent and Marvel M. Gary for the debt, he would forbear suit, and Woods did give the note; that was the only note of the same kind deponent ever indorsed for Brown, Woods & Co. and the only note of any kind he ever indorsed for them upon which Marvel M. Gary was also an indorser. No other security was asked or promised, so far as deponent ever heard, than the indorsement of Gary and himself. When the mortgage mentioned in the bill was executed, neither the complainant nor his agent was present, and neither of them knew that it was to be executed; the mortgage was executed to secure the debt due deponent by Brown, Woods & Co., and the debt to the complainant was only named to prevent the property from being sold under a judgment which Wilson, Carpenter & Co. were about to recover against Brown, Woods & Co. for twenty odd thousand dollars; it was named in the mortgage at the sug-

gestion of deponent, and he understood the chief inducement of doing so was to defeat Wilson, Carpenter & Co. in the collection of their debt. Deponent further testified that Woods sold one of the negro men mentioned in the mortgage, but whether it was with the assent or knowledge of complainant or not he did not know. The debt due deponent by Brown, Woods & Co. was paid by Wallace Wilson before the mortgage was released; since Wilson has been in possession of the land included in the mortgage, he has put about three hundred and eighty dollars' worth of improvements upon it. On cross-examination he stated he heard only one conversation between the agent of complainant and Woods, and they might have had others, but if they had, he never heard of them; the note was written by Thomas B. Wadlington, and deponent indorsed it at the request of Woods; the mortgage was executed at his suggestion, and was designed especially to secure the debt due him; that he did not intend perpetrating a fraud on Wilson, Carpenter & Co., and if any fraud was committed, Ross was no party to it; Ross was not present when the mortgage was executed, and he informed deponent that he knew nothing about it, until sometime afterwards; deponent thought Woods informed him when the mortgage was given that his, (Woods's,) object was to secure the debt due deponent, and to save his securities, and also to defeat the collection of Wilson, Carpenter & Co.'s claim; the mortgage was released at the request of both Woods and Wilson, and he did not give the release with the view or for the purpose of defeating complainant's lien on the mortgage property; and if there was any combination to defraud complainant, deponent never heard of it; the only benefit he derived from the release was the payment of his debt by Wilson. Notice was given that a motion would be made to exclude the deposition of Doyle, because he was a defendant to the suit, and there was no order of the court granting leave to take his deposition. Upon the foregoing pleadings and evidence, the cause was submitted to the vice-chancellor, on final hearing, and on the 18th day of June, 1844, he rendered a final decree dismissing the bill at the costs of the complainant, from which decree the complainant appealed to this court.

D. Mayes, for appellant.

If a creditor obtains a mortgage or other security from the principal debtor without the knowledge of the surety, the surety has the benefit of it, and if the creditor surrender or release such security without the consent of the surety, he thereby releases the surety to the extent of the security surrendered. 1 Story's Eq. 481, and authorities there cited.

And so in like manner if a surety has obtained an indemnity of any kind from his principal, his creditor is entitled to it, and may resort to it in equity for satisfaction. 1 Story's Eq. 481, and authorities there cited. In such case the debt is the principal thing, the mortgage or security is the incident, and he who owes the debt owes the security. Incidents follow their principals. When the surety pays his principal, the debt is not extinguished in the eye of equity, but the security is considered as having purchased the debt from the creditor, and so entitled to all the rights of the creditor. Meigs's R. 173, 174, in notes.

And when the surety has obtained an indemnity for a debt as the creditor has a right to look to him for payments, he has a right to all his means of indemnity. A co-surety has the same right. In other words, whoever has a right to demand payment from the indemnified surety, has a right to all his indemnities. *Gomez v. Lazarus et al.* 1 Dev. N. C. Eq. R. 205.

Were this then a case of mortgage to indemnify securities, we clearly had a right to it.

Much stronger is the present case, it not being a mortgage to indemnify securities, but a conveyance to the securities, to become void (not upon indemnifying them,) but if the debt shall be paid at maturity. It is plainly and singly a conveyance to them, to secure the prompt payment of Wilson's debt by Wilson to Ross.

Doyle and Garey then held the lands and slaves so far as Ross's debt was concerned, not as a present indemnity to them, but in trust for the payment of the debt to Ross, the property being pledged not for their indemnity but expressly to pay the

debt. And a trustee can, by no act of his, prejudice the rights of the *cestui que trust*. *Sheppard v. McEvans*, 4 Johns. Ch. R. 136. And the trust will follow the estate into the hands of any person to whom it has been conveyed with knowledge of the trust. *Ibid*. And if the trust has been created without the knowledge of the trustee, and before he obtain knowledge the trustee conveys without his consent, those who take under the second conveyance will be charged with the trust. *Ibid*. And see also *Moses et al. v. Margatoyd et al.* 1 Johns. Ch. R. 119; *Murray & Winter v. Bollou & Hunt*, 1 Johns. Ch. R. 566; *Duke of Cumberland et al. v. Coddington et al.* 3 Johns. Ch. R. 261.

A deed of trust in the usual form is but a mortgage with power of sale in the trustee.

All that is wanted to constitute the deed of Woods a deed of trust of the common kind, is the absence of the power of sale in Doyle and Garey, if Woods made default on the maturity of the note.

The writing purporting to be a release of the mortgage, can only operate as a renunciation of the trust. And equity will not permit a trust to fail for want of a trustee. The court will either appoint a trustee or execute the trust itself as the nature of the case may require. Story's Eq. 240, 241, 242.

The agreement which led to the release was a fraud on Rosa. It was virtually a sale by Doyle for the amount of his debt and a ratification by Garey, and the end and object to deprive Ross of his security. The jealousy and watchfulness with which equity scrutinizes all acts of persons standing in the relation of trustees, or fiduciaries, is remarked on in 1 Story's Eq. 316, 320.

Wilson was a purchaser not only with full notice but, the tempter (by a large payment,) of the trustees to betray their trust. It is true (and should be so) that if the property come to a *bona fide* purchaser for valuable consideration without notice, he will be protected, but this is a merit to which Wilson can by no means pretend; he had notice, took the property in payment of a preëxisting debt, and by collusion with the trustees attempted to defeat the trust.

Ross v. Wilson et al.

William G. Thompson, for appellees.

The prayer of the bill is not, technically, for a foreclosure of the mortgage. It is, simply, that the property may be sold to pay complainant's claim. It is difficult to determine from the frame of the bill whether its object is to seek a foreclosure of the mortgage in favor of complainant, or the aid of chancery for subjecting the property, as equitable assets or estate, to his judgment, or the aid of chancery for removing obstructions in the way of enforcing his judgment-lien on the property.

These three objects are distinct, each from the others, and must rest upon distinct states of fact. If the object be to remove obstructions in the way of enforcing complainant's judgment lien, equity will not interpose as against Wilson. He had a prior judgment for an amount evidently more than sufficient to cover the property. His equity, as a creditor, is equal to that of complainant. He holds the property by purchase, having taken it in payment of his judgment. If the object be to subject the property, as equitable estate, not subject to sale under execution, chancery will lend its aid only when the remedy at law has been exhausted. *Walker v. Todd*, 3 Dana's R. 509; 4 Johns. Ch. R. 691; 1 Freeman's Ch. R. 307.

There is no proof in the cause that complainant has had execution issued on his judgment, and returned *nulla bona*, as the bill alleges.

If the object be to foreclose the mortgage in favor of complainant, it is contended that there are insuperable objections to the relief sought. In a proceeding to foreclose a mortgage, the production of the note or bond secured is indispensable, unless its absence be satisfactorily accounted for and indemnity be offered. This is not rendered unnecessary by the recital in the mortgage, and the admission of the mortgagor in his answer. *Chewning v. Proctor*, 2 McCord's Ch. R. 14; *Burgwin v. Richardson*, 3 Hawks, 203.

Wilson, the purchaser from the mortgagor, is the main defendant in interest. Complainant must establish his claim by full proof as against him. Wilson is not bound by the admissions of Woods, through whom he derives his claim, any farther

than as to the fact of the execution of the note and mortgage. If Woods had not sold the property, and Wilson were not a party in this cause, the production of the note would still be required before a decree of foreclosure. In an action at law on a promissory note, the plea of the general issue admits the execution of the note; yet a verdict without the production of the note, or proof equivalent to that, could not be sustained.

A decree of foreclosure cannot be rendered without first setting aside the release entered by Doyle and Garey. There is no proof, whatever, showing that the mortgage was released through fraud, on the part of Doyle and Garey, or of Wilson, as is charged in the bill. The single question to be inquired into on this point is, whether Doyle and Garey had a right or power to give back to their principal, Woods, a security he had given them for their indemnity as his sureties, the debt being unpaid. It is admitted that a creditor may avail himself of a security given by the debtor to his surety. The general principle is well established. And the creditor may file a bill in his own name, to get the benefit of a mortgage given to the surety. But this is not an original and independent right belonging to the creditor; it is one which he derives entirely through the surety; it is rather, indeed, a favor allowed him, out of regard to the rights of the surety; it is not a separate and distinct right, but is wholly dependent upon, and follows the right of the surety. When the latter takes a security from his principal, it is done for the purpose of providing a fund to which he may resort for indemnity, if he has the debt to pay. And whilst he holds the security, he may be supposed to accord to the creditor the privilege of subjecting it to his claim, inasmuch as that would be a mode of effecting for him the very object for which he took the security. And it is upon this ground, that the creditor is allowed to proceed upon the security, upon the supposed assent of the surety, which it would be unreasonable and perverse for him to withhold. But, if the right of the surety is extinguished, and he has no power to do any act himself, in regard to the security, he can give effectively neither assent nor dissent touching it; how can any right possibly remain to the creditor? It

is only upon a subsisting indemnity held by the surety, that the creditor can enforce his claim.

William Thompson, on the same side.

Where a mortgage is made for the personal indemnity of the indorser, and the intention is not to secure the debt, the creditor cannot subject the property to the debt. As bearing on this point, see 1 Devereau's Eq. R. 205, 221; Chitty on Bills, 481.

That in this case the mortgage was made for the personal indemnity of the securities only, is evidenced, 1st, by its having been made sometime after the note on which the securities it is said are liable, was given. 2d. The sureties are stated in the mortgage to be indorsers, and therefore as they were not certainly and absolutely liable, it is to be understood that the object was to indemnify them against their contingent liability, and not to set apart this fund, in controversy, to pay the debt.

The court of equity will not compel a party to give up a legal advantage which he can conscientiously hold.

Ross's judgment was rendered after Wilson's. Ross advanced no new consideration, at least he did not part with his money or his property. When Doyle & Garey became sureties for Brown, Woods & Co. he only got an old debt secured.

There was no agreement to give this mortgage when the note was executed. The mortgage was given sometime afterwards, without Ross's knowledge, and for the security or indemnity of the sureties, and they could release it and Wilson with clean hands.

The recording of a mortgage is, of course, to give notice to subsequent purchasers, &c. The mortgage, as recorded, can never overreach Wilson.

But Ross desires to correct, amend, reform it; there is no proof of knowledge on the part of Wilson, other than that furnished by the record.

Mr. Justice CLAYTON delivered the opinion of the court.

Brown, Woods, & Co. were indebted to William B. Ross,

in the sum of \$6000, and on the 1st of March, 1838, Andrew Woods, one of the firm, gave his note at twelve months for the same, with M. M. Gary and William G. Doyle as sureties. The same firm was indebted very largely to Wallace Wilson. On the 10th of April, 1838, Andrew Woods conveyed to Doyle & Gary certain property and estate, on condition that if he, Woods, should pay the said note to William B. Ross, indorsed by Doyle & Gary, also a note due from Woods to Doyle for about \$2,000, then the said conveyance to be void, otherwise to remain in full force and virtue." This deed was duly recorded. In June, 1839, Wallace Wilson, having previously obtained a judgment on his debt against Brown, Woods & Co., agreed to pay the debt of William G. Doyle, if Doyle & Gary would release to him all interest, under the conveyance above described. This they both did. This bill is filed by Ross to subject the property to his debt, under the conveyance. Andrew Woods also conveyed to Wilson. The vice-chancellor dismissed the bill, and the cause thence comes to this court.

Although Ross knew nothing of this deed, at the time it was executed, yet as its provisions were for his benefit, his assent to it will be presumed. The conveyance was intended not only to indemnify Gary & Doyle against their liability as sureties, but manifestly to secure the payment of the debt. It was to be void, on condition that the debt was paid, otherwise not. What were formerly conditions are now regarded as trusts. Gary & Doyle were by this conveyance made trustees for the benefit of Ross. They had no power or right to discharge the trust or to defeat it, unless to a purchaser for valuable consideration without notice. Wilson, the purchaser in this instance, had notice; he therefore took the estate subject to the trust, and charged with the payment of the debt. In his answer he says, that he did not know whether the debt was paid or not; it was his duty to have inquired. Even if he had agreed to pay money for the estate, instead of merely satisfying his debt, it would have been incumbent upon him to have seen to its application to the object designated in the conveyance. 2 Sug. on Ven. and Pur. 32. He however, advanced no

new consideration, except that he agreed to pay the debt of Doyle; and he therefore does not occupy the attitude of a purchaser for valuable consideration.

An objection is urged to the complainant's right of recovery on the ground of variance, between the note and its description in the deed. The only difference is that Doyle & Gary are described in the deed as *indorsers*, when in truth they are *sureties* upon the face of the note. This difference could not have deceived the parties. The description is substantially correct. The bill alleges that there was a mistake in drawing the instrument, and the proof of the mistake by the depositions is abundant and unquestionable. Parol proof in equity is admissible, to show that a mistake occurred in drawing an instrument; though it is to be received with caution and distrust. See *Peques v. Mosby & Kyle*, and *Lauderdale v. Hallock & Bates*, decided at this term. Other objections are taken to the proceedings, which we think are not to be sustained.

On the whole, the decree must be reversed and the cause remanded. The property conveyed is declared to be subject to the debt of Ross. But as Wilson has paid the debt of Doyle, which was equally secured by the conveyance, he is entitled to stand in the place of Doyle.

A decree must be entered in the court below, directing that if the debt of Ross be not paid within three months from the date of such decree, that the said property must be sold on the terms usual upon foreclosure of a mortgage; that an account be taken of the amount due to Ross and Wilson upon the debt paid by him to Doyle, and the proceeds of the sale be divided between Ross and Wilson, *pro rata*, in proportion to the amount of their respective debts.

Decree reversed and cause remanded.

RICHARD HESTER vs. NATHAN HOOKER.

A bill for a specific performance or for the rescission of a contract is addressed to the sound discretion of the court: no certain, definite rule can be laid down, which would determine when a party was or was not entitled to such relief. Where a complainant seeking a rescission of a contract has not done all that he stipulated to do, or has not placed himself in a situation to be ready to do so, upon compliance on the other side, the court will not interpose in his behalf.

On a bill for a rescission of a contract for the purchase of land, the mere fact of the complainant's notes being outstanding, in the absence of fraud, does not, in this state, give right to a court of equity to interpose; in a state where notes are negotiable, in the mercantile sense of the term, a bill to restrain their transfer, and to compel their cancellation, might perhaps be maintained; but here, where the consideration may be inquired into, as well after assignment as before, equity would not assume jurisdiction to inquire into their validity.

Where a party sold land and gave a bond for title, and also stipulated to deliver possession of the land upon the payment of a portion of the purchase-money on a particular day; the purchaser failed to pay the money at the time specified, and the owner of the land subsequently sold it to a third person, and delivered possession to him; the latter sale was rescinded, and the owner filed a bill to compel a specific performance of the first contract: *Held*, that by the latter sale the vendor placed himself in a situation, in which he was not entitled to a decree for a specific performance against the first purchaser.

Hooker sold to Hester a tract of land and executed a title bond, in which he stipulated that he would surrender possession of the premises on the 1st day of September, 1838, upon the payment by Hester before that time of one of the notes given by him for the purchase-money, it being distinctly stated in the bond that the payment of the money should precede the delivery of possession; Hester failed to pay the money, and in October, 1838, Hooker sold the same land to Young, and delivered possession of the premises to him; the sale to Young was rescinded, and Hester subsequently filed a bill for a rescission of his contract with Hooker, and for a cancellation of his notes which were still outstanding; Hooker filed a cross bill to compel a specific performance of the contract, alleging a readiness upon his part to comply with the terms of the contract: *Held*, that both the original bill and cross-bill should be dismissed, and the parties left to their legal remedies.

Hester v. Hooker.

ERROR from the district chancery court at Carrollton; Hon. Henry Dickinson, vice-chancellor.

Richard Hester filed his bill in the district chancery court at Carrollton, against Nathan Hooker, charging, that on the 3d of April, 1838, he bargained with Hooker for a tract of land described in the bill, together with \$250 worth of corn, for which he was to pay the sum of \$11,000, to be paid as follows, to wit: \$1000 cash in hand, \$2666 66 on the 1st of September, 1838, \$3666 66 on the 1st January, 1840, and \$3666 66 on the 1st of January, 1841; he executed his three notes therefor, and he paid the \$1000 down as agreed upon; that on the 1st September, 1838, he was to have possession of the premises, together with the corn; and in pursuance of the contract Hooker executed to him a title bond, which is referred to as exhibit A.

The bill further stated that at the time of the contract complainant resided in Kentucky, and contemplated removing to Carroll county, Mississippi, where the land lies, and after the contract was made he returned to Kentucky, with the intention of bringing his family down to live on the place in Carroll county, Mississippi; but meeting with misfortunes in Kentucky, he found he would not be able to comply with his contract, and in the summer of 1838, he addressed a letter to Hooker, informing him of the facts, acknowledging his inability to perform his part of the contract, and requesting Hooker as a favor to rescind the same, and to pay over the thousand dollars paid thereon to several persons named in the letter. Hooker did not answer his letter, but shortly afterwards (and after Hooker had bargained the land again to one Thomas T. Young) one Mr. Ayres, who lived in Carroll county, and was then on a visit to Kentucky, called on complainant, and informed him that Hooker had instructed him to tell complainant that he (Hooker) was willing to refund one-half of the one thousand dollars, and rescind the contract; but complainant declined accepting the proposition.

The bill further charged that some time in the summer or fall of 1838, Hooker bargained and sold the same land to one Thomas T. Young for as large a price, or larger than complain-

ant was to have paid, and he put Young into immediate possession of the premises, and Young has had possession ever since. That the sale to Young was a virtual rescission of the contract between complainant and Hooker; and complainant therefore rested contented about the matter, expecting that when he visited Mississippi, Hooker would of course refund him his thousand dollars. That untoward circumstances prevented him from visiting Mississippi until a few weeks past, and to his great surprise, on calling on Hooker for his thousand dollars, Hooker refused to pay the same, but told him if he came back to Carroll to live, he would give him a cow and a calf.

The bill further stated that Hooker was seeking by bill in chancery to make void his sale to Young, and in contemplation thereof has bargained and sold the land again to his nephew, Nathan Hooker, jr. The bill prayed for a discovery from Hooker of the letter before referred to, and of the propositions he made through Ayers to rescind; and whether at that time he had not sold the land to Young; for a final rescission of the contract between Hooker and himself; that his notes be delivered up to be cancelled; and that his thousand dollars be refunded.

To this bill the defendant demurred and assigned the following causes of demurrer. 1st. Because the bill does not show that complainant offered to comply with his part of the contract. 2d. It does not show that Hooker has been in default. 3d. That complainant has never put himself in a situation to demand a title. 4th. Because it is admitted that complainant has been in default.

At the June term, 1843, the demurrer was overruled.

Hooker then answered and admitted the contract as set forth in the bill, and in Exhibit A, and filed the notes he received for the purchase-money, as Exhibit 1, 2, 3. H. denied that complainant paid him a thousand dollars, and stated he received only nine hundred dollars in Brandon money; he denied that he agreed unconditionally to deliver possession on 1st Sept. 1838, as charged, but stated that he required payment of the first note prior to delivering possession; that the payment of that note was a condition precedent. Respondent admitted that some-

time in the fall of 1838, he received a letter from complainant of the purport and tenor as set forth in the bill, which he produced, marked Exhibit 4. That soon after he received the letter he heard Mr. Ayres was going to Kentucky, and he sent by him his answer to complainant's proposition. By Mr. Ayres he informed complainant that he could not agree to a rescission of their contract as proposed, but he reduced to writing a proposition which he required complainant to sign, and complainant refused to do so; and they could never agree upon the terms of a rescission. He charged that he had sustained great damage in consequence of complainant's refusal to comply with his contract; that he never had at any time consented to rescind their contract. Respondent admitted that in the fall of 1838, when he ascertained complainant could not comply with his contract, he contracted to sell the land to Young, but never gave him a deed, and was not to give him one until the purchase-money was paid. That in selling to Young, his object was merely to raise the balance of the purchase-money due from complainant; and when he sold to Young, it was subject to the sale to complainant, and he so informed Young; that Young never paid him the purchase-money, and he rescinded the sale and obtained from Young rent for the term he occupied the premises.

That after complainant's default in making payment of the first note, due September, 1838, he let Young into possession of the land, and he remained until their contract was cancelled. He denied that he had ever conveyed the land since his sale to complainant, or made any other contract in regard to it than that with Young; and he made that only for the purpose of raising the balance due him by complainant. Respondent denied that he has been guilty of any breach of contract, or that complainant ever demanded possession of the premises, or performed or offered to perform his part of the contract. He charged that by complainant's failure to comply with his contract, he had sustained a damage far greater than the sum complainant paid him. He stated that he was then ready and willing to perform his part of the contract.

Respondent charged that complainant was indebted to him in

Hester v. Hooker.

the sum of \$250 for negro hire, as appears by a note which he made Exhibit 15, and asked that if he had to refund, that the \$250 be allowed him. Hooker also filed a cross-bill setting forth the contract between himself and Hester, substantially as set forth in his answer to the original bill, averring that the land was unincumbered and his title to the same perfect; that he was ready and willing on his part to comply with the contract; and he prayed a specific performance.

Hester answered the cross-bill, and admitted the allegations thereof as to the description of the land; the price at which he bought it; Hooker's title, &c.; he admitted, also, that only \$900 was paid by him instead of \$1000, as set forth in the original bill, and he admitted he had paid no other portion of the purchase-money, or given any other security therefor than his notes; that Hooker only gave his bond for title to be made when the purchase-money was paid; but he denied that the note for negro hire was due to Hooker as set forth in the cross-bill; he stated he informed Hooker he was about to trade for two notes of Hooker, due one O. H. King, and inquired whether they would be taken in discharge of the note for negro hire mentioned in the cross-bill; that Hooker agreed to take them; and he therefore did trade for them, and now has them and tenders them in discharge of his note for negro hire. He denied that the \$900 was paid in Brandon money, and stated that it was paid in good funds.

Thomas T. Young, whose deposition was taken by the complainant, testified, that in August, 1838, he saw the land described in the original and cross-bills, and being pleased with he proposed to buy it of the defendant; that defendant informed him the land had been sold to complainant, and stated the terms of sale, and said if it had not been sold to complainant he would let deponent have it. Sometime during the following October, deponent received a note from defendant stating that complainant had failed to comply with his contract, and if deponent then wanted to buy the land he could get it; deponent immediately went to the house of defendant, where he saw complainant's letter saying that in consequence of misfortunes

Hester v. Hooker.

and losses, he would be unable to comply with his contract; he then purchased the land from the defendant for eleven thousand dollars; five thousand eight hundred dollars to be paid in floats issued under the 14th article of the treaty of Dancing Rabbit Creek, and the residue in three equal instalments, the first payable six months after the date of his purchase, and the others in one and two years; that no deed was given to him by the defendant, nor was a deed to be made until the purchase-money was paid; their contract was reduced to writing, and possession of the premises delivered to deponent, and he remained in possession until some time in the winter of 1842, when his contract with defendant was rescinded, and the land delivered up. He paid defendant the first instalment, amounting to about seventeen hundred and twenty-six dollars, and failing to pay the second instalment, defendant filed a bill against him praying the payment of the purchase-money, or a rescission of the contract; that pending the suit the matter was referred to their friends, compromised, and their contract rescinded. When deponent purchased the land, he understood defendant to say he would refund to complainant the money he received from him, and rescind their contract. William Cothran, whose deposition was also read by complainant, testified that in 1839, according to the best of his recollection, he called on defendant and told him the complainant had written to G. F. Neill and himself, informing them that he had proposed to rescind a contract entered into by the defendant and himself relative to the sale and purchase of some land, and had authorized Neill and deponent to receive the money defendant had been requested to refund, and the defendant then informed deponent that he proposed to pay back to the complainant one half of the money received from him, and complainant had not replied to his proposition, and he would therefore have nothing further to do with the matter. On cross-examination, he said complainant had not informed him by letter or otherwise that defendant had sold the land to Young before the expiration of the time within which complainant was to perform the contract on his part; complainant did not claim a rescission as a matter of right, but

• said he had proposed to the defendant to rescind the contract, and that defendant should return the money paid him by complainant; G. F. Neill and deponent were also informed by complainant's letter, that defendant had proposed to pay back one half of the money he received, and rescind the contract, and complainant had refused to accept that proposition. J. B. Fort proved that the defendant informed him the sale to Young had been rescinded. James Wellons proved that a few days before the commencement of this suit, he went with complainant to the defendant to endeavor to settle the matter in dispute between them; complainant said defendant sold the land before the time he was to have given possession to complainant, and defendant denied, and they could not agree on any terms of settlement. On cross-examination, he said defendant agreed if complainant would return to the country to reside he would give him corn, stock, &c. A. W. Ayres proved that he bore a letter from defendant to complainant, then in Kentucky, containing a proposition to refund to the complainant one half of the money he paid defendant and rescind the contract between them, and that complainant refused to accede to the terms proposed. Being cross-examined, he said complainant resided in Christian county, Kentucky, when he called on him with the letter from defendant; and he believed defendant requested him, before he started to Kentucky, not to say anything to complainant about the sale of the land to Young. This was all the evidence adduced on either side. On the 17th day of December, 1844, the vice-chancellor dismissed the bill at the costs of the complainant, and the complainant removed the case to this court by writ of error.

Brooke, for plaintiff in error.

The same questions arise in this case on the final hearing, or bill, answer and proof, as were suggested by the demurrer, which was overruled. For the proof fully sustains every allegation of the bill. The deposition of Young proves that very soon after Hooker received Hester's letter proposing a rescission of the contract between them, Hooker informed him (Young)

that he was then prepared to sell the land, as Hester was not able to comply with his contract; that he would refund to him the money he, Hester had paid him, and rescind the contract. Young further proves that Hooker acted on Hester's letter by selling the land to him in Oct. 1838. This conduct of Hooker is what we rely on as the basis of our claim to a complete rescission and the refunding of the money paid by us. Can equity grant us this relief? Most unquestionably, for a court of equity is the only tribunal that can do complete justice by decreeing a cancellation of the notes yet outstanding. This is the main object to be effected by the bill. Did we seek nothing else but the refunding of the money paid, perhaps a court of law would be the proper, if not the only tribunal; but a court of law could do nothing as to the said notes. Its remedy, therefore, would be incomplete.

The rule that a party who seeks a rescission must show that he himself is ready and willing to perform his part, does not apply in this case. The necessity of doing this has been dispensed with by Hooker, inasmuch as by his act of selling to Young, he by the strongest implication accepted Hester's offer to rescind, and waived the payment of the first note, due in September, 1838. For observe that Young states that some time in that month Hooker informed him that he could then sell the place to him, and actually did sell it in the next month; would it not then be a mockery on the part of Hooker to require of Hester a tender of performance when he had at that time put it out of his power to accept it? This fact distinguishes this case from those cited by the other side, as will be seen by reference thereto. The cases cited by judge Shattuck, in his brief, are all-sufficient on this point.

If the decree of the vice-chancellor is right, we see no reason why the bill should not have been dismissed on demurrer, as the allegations thereof are entirely made out by the depositions. But they (particularly that of Young) show a course of double-dealing on the part of Hooker, that made a much stronger case against him on the final hearing than was given by the bill alone, as admitted by the demurrer.

As to the question of jurisdiction after answer, see *Underhill v. Van Courtlandt et al.* 2 J. C. R. 339.

Sheppard, for defendant in error.

If it had been stated in the bill that the contract had been rescinded, it would not present a case for relief in equity for, there would be a complete remedy at law.

The bill, however, shows that the contract was not rescinded, and that the terms of rescission mutually proposed were not accepted.

The agreement to sell to Young, made in October, 1838, vests in complainant no equity to insist on a rescission of his contract. It could do so only on the presumption that the vendor was not able to perform his part of the agreement; and for the vendee to avail himself of this ground of relief he must first put the vendor in default.

The title-bond particularly stipulates that the payment of the first instalment, on 1st of September, 1838, was a condition precedent to giving possession, and payment of all the purchase-money was a condition precedent to the execution of a deed.

The vendor should have first tendered a performance. *Harris et al. v. Bolton et al.* 7 How.

The answer and proof show that the vendor can now make a perfect and unincumbered title.

D. O. Shattuck, in reply.

The first position taken by Mr. Sheppard, is, that this court has no jurisdiction of the case; that if the complainant has any remedy, it is at law.

In answer to this, perhaps it would be sufficient to say, the question of jurisdiction has been raised and overruled upon demurrer to the bill. But apart from that decision, it will be seen that chancery is the only remedy. The only means by which the complainant can have his outstanding notes cancelled, which is one object to be effected by the bill, is by the aid of this court. And this is certainly his right, if he has any

right in the case, and therefore a bill is the proper remedy. This makes the case different in fact from the cases cited by Sheppard, (5 Johns. Ch. R. 193, and 4 Ibid. 559,) and makes those authorities inapplicable.

2. Mr. Sheppard's second argument is based upon the position that Hooker never abandoned his contract. Here we differ in the legal construction deducible from the debts of Hooker.

We contend that when Hooker sold to Young he voluntarily abandoned his contract with Hester. What else can be made of it? Will it be said that he considered it a contract when he pleased, and otherwise when he pleased. That to-day there is no contract, and I may sell to another, and that to-morrow I may enforce the specific performance. This cannot be. It is true that Mr. Hooker was not obliged to act upon the suggestion of Hester, and abandon the contract. He might have enforced it, but it suited his convenience best to sell to another; and he thereby released Hester from default, and from obligation to perform, and placed himself in a position not to comply on his part. "The production of a bad title, or a wrongful resale by the vendor, will render the preparation and tender of a conveyance by the purchaser unnecessary." See *Knight v. Crockford*, 1 Esp. R. 187; *Duke of St. Albans v. Shore*, 1 H. Bla. 270; *Newcomb v. Brackett*, 16 Mass. R. 161; *Eames v. Savage*, 14 Ibid. 425; Chitty on Contracts, 308, Springfield edition, 1842. Now the question arises, was the resale of Hooker to Young a *wrongful* resale? If it was, then it comes within the above rules, and the contract stood abandoned by his wrongful act. If the act was *not* wrongful, then in the resale he accepted the terms offered by Hester in his letter, and the contract would be abandoned by consent. In either case we would be entitled to our money and our notes, outstanding.

3. The point made that it would take a written agreement to rescind a contract, does not apply. This contract has been abandoned; abandoned by both parties, for lo! these many years. And after such abandonment a court can declare a rescission, and put the parties *in statu quo*.

Hester v. Hooker.

Mr. Justice CLAYTON delivered the opinion of the Court.

This was a bill filed by Hester in the vice-chancery court at Carrollton, to rescind a contract for the sale of a tract of land, and to obtain a decree for the repayment of nine hundred dollars, paid by him when the contract was made, and for the cancelling of several notes which he executed for the balance of the purchase-money.

The title bond executed by Hooker bound him to give possession of the premises 1st September, 1838, upon the payment of one of the notes by Hester, but distinctly states the payment is to precede the surrender of possession. Hester then resided in the state of Kentucky. Before the time appointed for the delivery of possession Hester wrote to Hooker, that he was unable to comply with the contract, and asking for the repayment of the money paid, and for a rescission of the contract. Hooker refused to repay the whole amount, but offered to pay part and rescind; this was declined by Hester. In October, 1838, Hooker sold the premises to one Thomas Young, and put him in possession. At a subsequent period, this contract was rescinded. Hester's bill was filed, to which a demurrer was interposed, and overruled. Hooker then filed a cross-bill for a specific performance of the contract, alleging a readiness upon his part to comply. The vice-chancellor dismissed Hester's bill with costs, but made no decree as to the cross-bill.

A bill for a specific performance, or for the rescission of a contract, is addressed to the sound discretion of the court. No certain, definite rule can be laid down, which would determine when a party was or was not entitled to such relief. Cases are numerous in which both bill and cross-bill have been dismissed, and the parties respectively left to their remedies at law. When the complainant has not done all that he stipulated to do, or has not placed himself in a situation to be ready to do so, upon compliance on the other side, the court will not interpose in his behalf. The complainant in the original bill stands here in that position. He not only has not performed his part of the contract, but he makes his own inability to perform in reality the ground of asking for a rescission. There is no pretence,

that Hooker would not have complied punctually with his engagement, if the other party had performed his part. Hooker's alleged breach of the contract was after the failure of the complainant to comply.

It is said in argument that Hester is entitled to the relief prayed for in chancery, because a court of law cannot compel a delivery of his notes which are now outstanding. This may be true, and yet a court of equity may not, on that account, be authorized or required to assume jurisdiction. If the outstanding of a complainant's notes, in a case free from fraud, is a circumstance in itself and standing alone; which gives right to a court of equity to interpose, then the sphere of its jurisdiction will be greatly enlarged. The principle would be applicable to notes of every description, as well those given for personal as for real property. In a state where notes are negotiable, in the mercantile sense of the term, a bill to restrain their transfer, and to compel their cancellation, might perhaps be maintained. But here, where the consideration may be inquired into, as well after assignment as before, equity would not assume jurisdiction to inquire into their validity, in a case like this; but would leave the parties to settle the question at law.

From the conduct of Hooper in selling the land to Young, we think he has placed himself in a situation, in which he is not entitled to a decree for a specific performance. We shall therefore leave the parties to their legal remedies.

The decree of the court below dismissing the bill of Hester, is affirmed; the cross-bill of Hooker will likewise be dismissed at his (Hooker's) costs. Hester to pay the costs of this court.

This decree to be without prejudice to any remedy at law which either party may think proper to pursue.

THE HEIRS OF JOSEPH MCAFEE vs. GARRETT KEIRN.

The right of preëmption granted to the actual settler by the acts of congress, in 1830 and 1834, although a gratuity, constitutes as valid a right as if it were founded on a valuable consideration ; and creates an equity in favor of the occupant which excludes all other rights, and which could only be lost by a failure to make the entry within the time prescribed by the acts.

Where an actual settler, claiming a preëmption right, has fully complied with the requisitions of the law, and received a patent, his title must be regarded as superior in a court of equity, to any title acquired by mere entry and a patent on it, although it be older than the patent under the preëmption right ; the patent relates to the inception of title, and in a court of equity, the person who has first appropriated has the best title.

A junior patent predicated on a senior preëmption right, will overrule a senior patent to the assignees of Jefferson College, which issued in accordance with the provisions of the act of congress in favor of Jefferson College.

A junior patent predicated on a reservation to a Choctaw Indian, under the treaty of Dancing Rabbit Creek, is a superior title to a senior patent to the assignees of Jefferson College.

On appeal from the superior court of chancery ; Hon. Robert H. Buckner, chancellor.

On the 23d day of October, 1843, Garrett Keirn filed in the superior court of chancery his bill against Morgan McAfee, Madison McAfee, John H. McAfee, Jesse McAfee, Margaret Colbert, Joseph McAfee, John G. Parker, and Elizabeth his wife, Lazarus B. Ragan and Minerva his wife, Joseph Lott, Sarah Lott, Morgan Lott, William Lott, Thomas Lott, Margaret Lott, Absalom Powell and Angeline his wife, William M. Jayne, Joseph M. Jayne, Joseph Colbert, Anna Jane, Amanda, Mary and Minerva Colbert, alleging that prior to the 19th day of June, 1844, he was an occupant of lots numbered 2, 3, 6 and 7, of section 12, in township 16, of range 1, west, subject to sale at Mount Salus, containing one hundred and eighty-one acres, and all at that time public land, belonging

to the United States of America ; that on the 19th day of June, 1834, he was in possession of the same, and in 1833, he cultivated a quarter of a section thereof; that being in possession of the land and having cultivated the same, he was entitled and desirous to claim the benefit of the laws of the United States of the 29th day of May, 1830, and the 19th day of June, 1834, by which preëmption rights were granted and secured to settlers upon public lands in the manner and form therein set forth ; that he made proof of his possession and cultivation of the land to the satisfaction of the register and receiver of the land district in which the lands were situated; and on the 8th day of November, 1834, he purchased the same from the United States, and received the register's certificate of purchase of that date, having previously paid the purchase-money, amounting to \$226 25 ; and he filed the register's certificate as exhibit A. to the bill. That on the 10th day of February, 1840, the United States issued to him a patent for the land, thereby fully vesting in him the legal and equitable title to the same; which was filed with the bill as exhibit B. ; that he had continued in the possession of the land, and cultivated it from 1833 to that time, and was then in possession of it. Complainant further alleges that on the 16th day of August, 1834, Joseph McAfee, since deceased, by his agent Morgan McAfee, deposited and caused to be recorded in the office of the district of lands for sale at Mount Salus, a deed of transfer under the corporate seal of Jefferson College, dated the 16th day of August, 1834, for two sections of land, to which the college was entitled by virtue of the act of the congress of the United States of the 20th day of April, 1832, entitled "an act for the relief of Jefferson College, in the state of Mississippi;" that Joseph McAfee, therefore claimed the right to enter and locate as unappropriated land, the four lots above-mentioned in the possession of complainant, and received from the register a certificate that he had entered and located the same; a copy of which certificate was filed as exhibit C to the bill; that Morgan McAfee, at the time he deposited the deed and received the register's certificate, well knew that complainant was in

McAfee v. Keirn.

possession of the land, had cultivated it in 1833, was in possession of it on the 19th day of June, 1834, and had the right and privilege of entering the same as preëmtor, and that he intended to comply with the provisions of the preëmption law. Yet with a full knowledge of these facts, Morgan McAfee was fraudulently seeking to deprive complainant of the benefit of the provisions of the preëmption law. Complainant further charged that the title which he acquired to the land, by virtue of his entry as preëmtor, and the subsequent issuance of a patent to him, was valid in a court of equity against the legal title which McAfee acquired; but in a court of law, he was advised, it was extremely doubtful whether he could sustain his claim against the title of McAfee; that Joseph McAfee had departed this life, leaving the above-mentioned defendants his children and heirs at law. Complainant further charged that Gilbert B. Collins, who was a native of the Choctaw tribe of Indians, had in actual cultivation during the year 1830, a tract of from two to twelve acres of land, with a dwelling-house thereon; and was, in consideration thereof, by virtue of the 19th article of the treaty of Dancing Rabbit Creek, entered into by the United States and the Choctaw tribe of Indians, on the 27th day of September, 1830, entitled to a reservation of one-eighth of a section of land, to include that portion of the land he had in cultivation and upon which his dwelling-house was situated; that the lands were surveyed, and it was ascertained that the eighth of land including the dwelling-house and improvement of Collins, embraced lots one and eighth in section 12, township 16, of range one, west; that Collins applied to the locating agent of the United States in pursuance of the 19th article of the treaty of Dancing Rabbit Creek, and lots one and eight were reserved and set apart by the agent of the United States for him, and were so marked upon the maps, and appeared upon the records of the office of register for the district of lands, subject to entry at Mount Salus; and a certificate of the register of the land-office, showing those facts was filed as exhibit D to the bill; that on the 28th day of October, 1831, Collins sold and conveyed lots one and eight,

McAfee v. Keirn.

reserved for him, to complainant, by deed of that date, which deed was filed as exhibit E to the bill, and immediately placed complainant in possession of the same, and he has continued in the possession and cultivation of it ever since; that the patent from the United States for the eighth of a section conveyed by Collins to complainant, had not then issued, but it was supposed it would be issued soon, and when issued it would be filed as exhibit F to the bill; that he was advised and believed he had a valid, equitable, if not a good legal title to land so purchased of Collins. Yet Joseph McAfee, under his deed above-mentioned, claimed the right to locate and enter as vacant and unappropriated land, the lots one and eight, conveyed by Collins to complainant, and on the 16th day of August, 1834, he received from the Register of the land-office at Mount Salus a certificate that he had located and entered the same. Complainant charged that lots one and eight were in his possession and cultivated by him, and belonged to him by virtue of his purchase from Collins, at the time McAfee pretended to locate and enter them, as Morgan McAfee, the agent who acted for Joseph McAfee, then well knew; and he therefore charged that the conduct of Morgan McAfee in relation to that matter was fraudulent and iniquitous. Complainant further charged that the heirs of Joseph McAfee were claiming all of the above-mentioned lands, and had instituted an action of ejectment in the circuit court of Holmes county for the recovery of the same, and were endeavoring to eject and dispossess complainant thereof. The prayer was for a perpetual injunction against the action of ejectment, and all other proceedings by the defendants, for the recovery of the lands; and if the court were of opinion that complainant had a good legal title to the land, that the certificate held by the defendants should be delivered up and cancelled; or if the court should believe that the legal title was in the defendants, by virtue of the register's certificate to their ancestor, that they should be declared trustees, holding the title for the benefit of complainant, and compelled by sufficient deed to convey the same to him. An injunction was granted, according to the

McAfee v. Keirn,

prayer of the bill, by the Hon. William L. Sharkey. **Exhibit A** contained affidavits of the complainant, B. T. Edrington and Joseph L. Chappell, that complainant cultivated lots No. 2, 3, 6 and 7, in section No. 12, township No. 16, of range No. 1, west, in 1833, and was in possession of the same on the 19th day of June, 1834; the certificate of Henry G. Johnson, a justice of the peace, that he had been personally and intimately acquainted with the complainant, B. T. Edrington, and Joseph L. Chappell, for some years, and they were men of strict veracity and entitled to full faith and credit; the written statement of J. L. Sumerall, register, and S. W. Dickson, receiver, that the affidavits were laid before them, and they were satisfied the evidence was sufficient to entitle the complainant to the benefit of the preëmption law; and the certificate of the register, dated the 8th day of November, 1834, that the complainant had purchased the above-named lots, and paid the purchase-money therefor, amounting to \$226 25, and was entitled to a patent for the same. The other exhibits are substantially stated in the bill. Morgan McAfee answered, that his father, Joseph McAfee, purchased two sections of land in 1833, from Jefferson College, which gave him the right to locate any unappropriated lands in the Choctaw country; that on the 16th day of August, 1834, as the agent of his father, he applied to the register of the land office at Mount Salus to locate two sections of land, and he was permitted to do so; upon examination he ascertained that lots No. 1, 2, 3, 6, 7 and 8, in section No. 12, of township No. 16, of range No. 1, west, were vacant and unappropriated, and he thereupon located and entered them, under and by virtue of the provisions of the act of congress, of the 20th of April, 1832, believing at the same time that congress could not pass any law to deprive Joseph McAfee of the right he obtained to the land under his purchase from Jefferson College; that he acted in good faith and with the single view of making Joseph McAfee's contract with the college available, and no fraud was either intended or committed on the rights of the complainant. Respondent did not know, of his own knowledge, nor was he advised by

the complainant, or any other person, that complainant had any claim to all, or either, of the lots; the map did not show, at the time respondent made the location, that the lands had been applied for by any person; and the register of the land office pronounced them vacant and unappropriated, and subject to be located under the Jefferson college floats. Respondent admitted that at the time he applied to enter the lands, he was aware of the fact that complainant was in possession of the same, and that he had cultivated them, or part of them, in the year 1833, and was in possession of them, or part of them, on the 19th day of June, 1834, and presumed (but did not know) that he was entitled to the right and privilege of entering the same as a preëmtor, by complying with the provisions of the different acts of congress in such case made and provided. But respondent insisted that complainant's inchoate right of preëmption could not alter previously vested rights conferred by contracts upon other and prior purchasers of the public domain. Respondent understood that complainant designed applying for the benefit of the preëmption laws, but he did not know, nor was he informed, what particular lands were intended to be embraced in his claim. In relation to the purchase alleged to have been made by complainant, of Gilbert B. Collins, respondent knew nothing; he therefore neither admitted nor denied the allegations on that subject, and called for strict proof; he denied all the fraud with which he was charged in the bill. The other defendants answered that they knew nothing in relation to the subject-matter of the bill, but what they learned from their co-defendant, Morgan McAfee, and they therefore referred to his answer, which they believed contained the truth.

The defendants read a transcript from the register of reserves, kept by the locating agent, dated Clinton, November 8, 1834, the first line of which was in these words: "G. B. Collins's lots No. 1 and 8, S. No. 12, T. 16; R. 1, W. conditioned;" to which was annexed the following certificate, to wit: "I certify the above is a copy of the names of reserves taken from my register as locating agent. G. W. MARTIN. November 8, 1834."

And they also read the following letter and certificate :

" *Chocchuma, Dec. 4, 1834.*

" To the Register and Receiver at Clinton,

" GENT. — I am confident that from the fact of reserves made by order of the secretary of the treasury with regard to the lands in Township 16, Range 1, that it will be impossible for me, as locating agent, to arrange the numerous conflicting claims in that township, and I would therefore recommend that the said township entire be reserved from sale.

" I am very respectfully yours, GEO. W. MARTIN."

Land Office, Jackson, Miss. Jan. 17, 1845.

" I, B. R. Cowherd, register of the land office at this place, do hereby certify that the foregoing transcript and letter contains every thing in my office in relation to the sections of reservations made by George W. Martin as locating agent.

" Given under my hand the day and date above written.

" B. R. COWHERD, *Register.*"

The deposition of Henry G. Johnston was read on behalf of the complainant, and proved that deponent was at the land office at Mount Salus, and heard a conversation between the register and Morgan McAfee, the precise date of which deponent did not recollect, in relation to the location of floats, which seemed to be the business of McAfee, in which conversation McAfee spoke very highly of Dr. Keirn, the complainant, and expressed his regret that his interest led him to interfere with the doctor's claim, but his interest required him to do it, and he would do it, and he then made his location covering Dr. Keirn's preemption. Deponent recollected the conversation distinctly because Dr. Keirn and himself being brothers-in-law, he paid particular attention to it, and informed Dr. Keirn of it the first time he met him after the conversation took place. Upon cross-examination, he said he knew that McAfee was aware of the fact that Dr. Keirn claimed a preemption, because he heard the register tell him so, and it was in answer to that statement of the register, that McAfee responded that he regretted to interfere with Dr. Keirn's claim. In this condition the cause was

McAfee v. Keirn.

submitted to the chancellor, who rendered a final decree on the 1st day of March, 1845; perpetually enjoining the defendants from prosecuting any further their action of ejectment, or instituting any other proceeding for the recovery of the lands described in the bill. From which decree the defendants appealed to this court.

W. R. Miles, for appellants.

William Yarger, for appellee.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

This is an appeal from the superior court of chancery, which presents two questions: First, will a junior patent predicated on a senior preëmption right, overreach a senior patent to the assignees of Jefferson College, which issued in accordance with the provisions of the act of congress, in favor of Jefferson College? And second, is a junior patent, predicated on a reservation to a Choctaw Indian, under the treaty of Dancing Rabbit Creek, a superior title to a patent to the assignees of Jefferson College?

It appears that Keirn claimed to enter four lots of land in Section No. 12, of Township No. 16, of Range 1, West, under the act of congress of 1834, which extended the act of 1830, with some additional provisions. The first act gave a right of preëmption to every occupant of public land, who was in possession of the land at the date of the act, and who had cultivated part of it in 1829, on his making proper proof before the register and receiver of the office where the land was subject to entry. This act was only to continue in force a limited time. The act of 1834 revived the act of 1830, and extended the right of preëmption to persons then in possession, who had cultivated a part of the land in 1833. This last act was to continue in force two years. The right granted under these acts extended only to a quarter section of land. These acts only granted the right on certain conditions, or rather to a class of persons who had performed certain requisites, the proof of which was re-

quired to be made in a particular way. It is evident that no one could claim the benefit of these acts, unless he could bring himself fully within their provisions, not only with regard to the facts to be proven, but also in the manner of making the proof. On the 20th of September, 1834, Keirn presented to the register and receiver of the land office at Mount Salus, his affidavit, stating therein that he had cultivated part of the land in 1833, and had possession of it on the 19th of June, 1834, the date of the act. He also proved the same facts by the separate affidavits of two witnesses, B. T. Edrington and Joseph L. Chappell, and presented the certificate of Henry G. Johnston, stating that he knew the witnesses, and believed them to be men of veracity and entitled to credit, whereupon the register and receiver signed a joint certificate, acknowledging themselves to be satisfied with the witnesses, and on the 8th of November, 1834, Keirn received from the register a certificate of entry. On the 10th of February, 1841, a patent issued.

On the 16th of August, 1834, Joseph McAfee, as assignee of Jefferson College, presented his deed of transfer to the register of the land office at Mount Salus, for two sections of land, and made his location so as to include the land already mentioned as claimed by Keirn, and received the register's certificate, which is declared by the act of congress to be equivalent to a patent. McAfee therefore had the older patent, and unless Keirn can make his junior patent retake back to his prior right of preëmption, he must fail.

These preëmption acts do not confine the right to any particular lands. The whole of the public domain was subject to this right, with the exceptions mentioned in the act. We cannot question the right of congress to confer this privilege on the actual settler, and the fact that it was a gratuity, makes no difference; the right is as valid as though it had been founded on a valuable consideration. It amounted to something more than a mere right to enter the land at government price; that right every citizen had, and if the act of congress did no more, it was useless. But it did more; it gave a preference to the actual settler, the effect of which was to exclude the right of all others

so long as this preference could be claimed. Hence it was a requisition of the proper department, or a provision of law, that no entry should be allowed until the applicant had filed an affidavit that the land was not occupied or cultivated. This right of preëmption then constituted an equity in favor of the occupant. Not an uncertain indefinite equity; it was located and identified; it attached to the particular quarter section occupied and cultivated by the claimant. The act of congress was an appropriation of all land so occupied. This equity might be lost, of course, by a failure to make the entry within the prescribed time, but during the whole of that time the occupant had a right to make the entry at the minimum price, to the exclusion of all other entries. Keirn has shown a complete equity, by a literal compliance with every provision of the law, and having subsequently made the entry and received a patent, his title must be regarded as superior in a court of equity, to any title acquired by mere entry, and a patent on it, although it be older than the patent under the preëmption right. Equity looks to the incipient right, and couples to it the perfect title. The patent relates to the inception of title, and in a court of equity the person who has first appropriated the land, has the best title. *Taylor v. Brown*, 5 Cranch, 234; *Polk's Lessee v. Wendell*, 9 Cranch, 87; *Fenley v. Williams*, Ib. 164; *McArthur v. Browder*, 4 Wheaton, 488; *Isaacs v. Steel*, 3 Scam. R. 97; *Bruner v. Manlove*, Ib. 339. The bill charges McAfee with notice of complainant's preëmption-right at the time he made his location, and the answer admits that respondent knew that Keirn was in possession of the land. He made his location then with a full knowledge of the complainant's right.

But it has been insisted that the appellants have a title superior to that of a common purchaser of public land, inasmuch as they derive title through Jefferson College, which was privileged to locate the quantity of land granted to it, on any *vacant and unappropriated* land, either *before* or *after* it had been offered for sale. The preëmption laws extended precisely the same right; they did not confine the claimant to land that had been offered for sale, or even to land that had been surveyed.

The right of Jefferson college was to locate unappropriate land; the preëmption right is based upon actual location, and in consequence of the location, the land was appropriated. But if there could be any doubt on this subject, we might regard the question as virtually settled, by the decision of the commissioner of the general land office, which is against the validity of McAfee's entry, and in favor of Keirn. It seems also that the secretary of the treasury decided that McAfee's claim must yield to the preëmption claimant.

The distinction between this case and that of *Fulton et al. v. Doe ex dem. McAfee*, 5 Howard, 751, is quite clear. That was an action at law, in which the junior patentee wished to go behind his patent, and establish his right in virtue of the preëmption laws; and he even failed in showing that he was within the provision of those laws. He had not made the requisite proof to entitle him to a preëmption right, nor had he made it in the manner prescribed.

With regard to that portion of the land claimed under the reservation, in the Choctaw treaty, there is no room for even a doubt. It seems that the land was reserved from sale for Collins the Indian, by G. W. Martin the locating agent. The reservations under that treaty have been held to be complete titles, subject to be defeated by the non-performance of conditions subsequent. Collins's title then accrued in 1830. He transferred it to Keirn by the consent of the president of the United States, and Keirn has received a patent. The reservation under the treaty, properly transferred to Keirn, even without the patent, would have been sufficient as against McAfee's title. Altogether, we think the decree of the chancellor was right, and it is accordingly affirmed.

JOHN M. CHILTON vs. NATHANIEL COX, Administrator of Samuel B. Slocumb, deceased.

Where the lien of a judgment upon slaves has once attached in one county, the removal of the slaves to another county, by the defendant, without the knowledge of the plaintiff, cannot defeat the lien of the judgment; such removal by the judgment-debtor being a fraud upon the judgment-creditor. A forthcoming bond after forfeiture becomes, by operation of law, a judgment, which extinguishes the original judgment, and also all liens created by that judgment.

ON appeal from the superior court of chancery; Hon Robert H. Buckner, chancellor.

On the 3d day of July, 1843, John M. Chilton filed his bill in the superior court of chancery, against Nathaniel Cox, administrator of Samuel B. Slocumb, deceased, alleging, that on the 25th of March, 1843, John S. Brien, then of Warren county, conveyed to him in trust, to secure to Kirkman, a note of John S. Brien for \$6628 94, bearing even date with the deed of trust, and payable on the 1st of February, 1843, Abernathy, and Hanna, Nat, Israel, *Jerry* and other negro slaves, then in the possession of Brien, which deed of trust was duly recorded in Warren county, where the negroes then were; that within twelve months past the negroes were removed to Hinds county, by Brien, and a copy of the deed of trust was duly recorded in Hinds county, in January, 1843; a copy of which was made an exhibit to the bill; from which it appears that the deed of trust was dated on the 25th day of March, 1843, and acknowledged and filed for record in the office of the clerk of the probate court of Warren county, on the 26th day of March, 1842, and that it was executed to secure the payment of the note made by John S. Brien, mentioned in the bill. Complainant further alleges that at the date of the trust deed, there

was a judgment of the circuit court of Warren county, in favor of the defendant, and against said Brien, for the sum of \$676 94, with interest from the 3d of May, 1842; that a *fi. fa.* had been issued on that judgment and levied on the negroes *Jerry* and *Israel*; and Brien gave a forthcoming bond which was forfeited October 17, 1842, and at the October term 1842, of the Warren circuit court, judgment was entered on the forfeited bond, against the principal and sureties therein; that neither the original judgment, nor the judgment on the forthcoming bond had been recorded in Hinds, and by the failure to record them in Hinds the liens of the judgments were postponed to the lien of the deed of trust; that by the forfeiture of the forthcoming bond, the lien of the original judgment was satisfied and the lien in favor of the defendant then dated only from the forfeiture of the bond, which was junior to the lien created by the deed of trust; that notwithstanding the lien of the defendant's judgment was junior to that in favor of complainant, the defendant had caused an execution issued on the forfeited forthcoming bond to be levied on the negroes *Nat* and *Jerry*, and the sheriff of Hinds county had advertised them for sale on the 3d of April, 1843, and would sell them on that day, unless restrained by the court. The bill prayed a restitution of the property and for a perpetual injunction. An injunction was granted April 2d, 1843, by the Hon. Robert H. Buckner. On the 3d of July, 1843, on motion of the defendant to dissolve the injunction for want of equity on the face of the bill, the chancellor ordered that the injunction be dissolved as to the slave *Jerry*, and retained as to *Nat*. From which interlocutory order the complainant appealed to this court.

P. W. Tompkins, for appellant.

There seems to me to be but one question in this case, and that is, whether the execution of the forthcoming bond by Brien, which was forfeited 17th October, 1842, raised the lien created by the original judgment of Cox. That it did, see the following authorities: 1 How. R. 64; 3 Ibid. 60. See also, as bearing upon the point, 5 How. 200, 566; 6 Ibid. 513; 1 S. & M. 386; 2 Ibid. 457.

Chilton v. Cox.

No distinction is seen between the effect such bond and judgment by operation of law upon its forfeiture is to have as to property specified in the bond, and other property of the defendant, though the chancellor, in his order made in this case, has taken a distinction; for he has dissolved the injunction as to *Jerry*, and retained it as to Nat. *Jerry* is specified in the forthcoming bond, Nat is not.

If the execution and forfeiture of the forthcoming bond removed Cox's original judgment lien, and the deed of trust was executed in March, 1842, then the simple, naked question left for the examination and decision of this court is, whether the fact of *Jerry* being one of the negroes specified in the forthcoming bond, constitutes any exception to the rule; whether Cox's lien as to him is thereby preserved.

Though the deed seems to bear date 25th March, 1843, the certificate of acknowledgment and record is dated 26th March, 1842. In the deed will be found evidence that the deed could not in fact have been executed in March, 1843, for it recites that the notes were of even date with the deed, and made due and payable on the 3d day of February, 1843, with interest from 10th March, 1842. Provision is made for the execution of the trust, if payment should not be made. The payment and the enforcement of payment, by the terms and tenor of the deed throughout, were regarded and provided for as things *in futuro*; yet, if the true date of the deed was March, 1843, the day of payment, February, 1843, had already passed.

The clerk's certificates of the acknowledgment and record of the deed of trust, furnish some elucidation as to the confusion about dates. They being 26th March, 1842, come, in aid of the terms of the deed, to show that it was executed in March, 1842.

Parson, for appellee.

If the dates are correctly stated the trust is fraudulent on its face, as it regards the execution enjoined, and an evident conspiracy to defraud the judgment creditor is shown. The haste with which all the steps are taken is conclusive of this. I can-

not think that the dates are correctly stated ; yet, so far as this appeal is concerned, and the decision of the chancellor, they must be taken to be so. There is nothing in the bill or exhibits, by which any supposed error can be corrected. The date of the certified deed corresponds with the statement of the bill ; and if we suppose 1842, or any other year to have been intended, instead of 1843, and that the judgment was of May 3, 1842, then the judgment was subsequent, and not prior to the trust, as stated in the bill.

But apart from the dates, and taking the original judgment as *prior* to the execution of the trust, and the forfeiture of the forthcoming bond as *subsequent*, the appellee insists that, as regards the slaves Jerry and Israel, they being the property mentioned in the forthcoming bond, there exists in his favor a continuous lien, from the date of the original judgment, not raised or avoided by the forthcoming bond and its forfeiture.

This court has decided in numerous cases, that by the forfeiture of a forthcoming bond the original judgment is satisfied. In the different opinions there is some variety in the language of the court. In the case of *Davis v. Dixon's Administrator*, 1 How. 64, it is said, "The giving of a forthcoming bond is a satisfaction of the prior judgment, if the bond be forfeited." In the case of *Witherspoon v. Spring*, 3 Ibid. 60, the court say, "It has long been the settled law of this court, that the levy of a writ of *fiery facias*, followed by the taking and forfeiture of a forthcoming bond, is a full satisfaction of the judgment on which the execution was issued." In some other cases the forfeiture of the bond is spoken of as a satisfaction of the prior judgment.

These decisions leave no room for question, but that from and after the forfeiture of the bond the judgment is technically "satisfied;" but is this "satisfaction" by virtue of the levy ; the execution of the bond or its forfeiture, or the three in conjunction ? It is contended on behalf of the appellee, that it is by virtue of the levy alone. A levy of an execution on personal property, is *pro tanto* a satisfaction of the judgment. See 1 How. R. 39 ; 3 Ibid. 417 ; 5 Ibid. 237 ; 6 Ibid. 540 ; 1 Salk. 322 ; 1 Burr, 34.

But it is further contended by the bill, that the appellee lost his lien by a failure to record his judgment in Hinds county, under the abstract law of 1841.

That statute can have no application to this case. At the time of the rendition of the judgment the property was in Warren county, and the lien then and there attached, and no subsequent removal of the property by the defendant, without notice to the judgment creditor, and without any fraudulent delay in the prosecution of his execution, could defeat it, and particularly where, as in this case, the adverse claimant acquired his rights with full notice of the outstanding judgment lien. Under the construction of the statute contended for by the appellant it would at all times be in the power of the fraudulent debtor to defeat the lien of his judgment creditor. And scarcely a more striking illustration of the frauds which would grow out of such a construction could be given than that disclosed in this case.

Mr. Justice THACHER delivered the opinion of the court.

This is an appeal from an interlocutory decree of the chancellor.

The bill of the appellant, as it appears in the record, sets forth that upon the 25th day of March 1843, John S. Brien executed a deed of trust to the appellant upon certain slaves, among which were three, called Nat, Israel and Jerry, to secure the payment of a debt of \$6628 94, due by Brien to Kirkman, Abernathy and Hanna, and that the deed was duly recorded in Warren county where the slaves were at the time of the execution of the deed, and also that upon the removal of the slaves into Hinds county, the deed was duly recorded there in January, 1843. The bill further sets forth that at the date of the said deed of trust, there existed a judgment of the circuit court of Warren county in favor of the appellee and against Brien for \$676 94, with interest from the 3d day of May, 1842; that upon this judgment an execution was issued into Hinds county, and levied upon the slaves Jerry and Israel, above mentioned, whereupon Brien executed a forthcoming bond with sureties,

which became forfeited on the 17th day of October, 1842; and that an execution growing out of the judgment upon the forthcoming bond had been levied upon the slaves Nat and Jerry above mentioned. The bill prays for an injunction against the sale of the said slaves under said execution. Upon a motion to dissolve the injunction for want of equity upon the face of the bill, the chancellor decreed that the injunction be dissolved as to the slave Jerry, and retained as to the slave Nat.

From an inspection of the bill and comparison with the deed of trust, it is manifest that there is some mistake in regard to the date of the execution of the deed. The deed seems to have been received for record in Warren county upon the 26th day of March, 1842. There is internal evidence in the deed that it could not have been executed as late as March 25th, 1843. But again, the bill charges that the judgment against Brien in the circuit court existed at the time of the execution of the deed, while the actual date of the judgment is arrived at by counsel in arguing the case only from the inference of the time at which its interest commenced to run. Steps will probably be taken in the progress of the case below to reconcile or correct the inconsistencies that seem to subsist at its present stage. The record is, however, in sufficiently perfect shape to bring up what appears to be the prominent point at issue now presented. In reference to an incidental question arising from the alleged circumstance that the appellee had omitted to record his judgment or an abstract of it in Hinds county in accordance with the statute of 1841, it is enough to observe that the claim of the appellee is based upon an execution lien, and not upon the judgment lien. But if the judgment lien had already inured upon the slaves in Warren county, then their removal into Hinds county by the defendant in the judgment, could not defeat that lien, but this is upon the ground of the ignorance of the plaintiff of such removal, and upon the ground that such removal by a judgment debtor is a fraud upon his judgment creditor.

The main question in this case, however, is, when did the lien of the appellee date, and does it date from the forfeiture of the forthcoming bond? This question has already been ad-

judicated in this court. In the case of *Archibald and Agnes Clark v. Anderson*, 2 How. 852, the court say, "the forthcoming bond *after forfeiture* becomes by operation of law, a judgment, and as the law will not permit two judgments to exist at the same time against the same person for the same debt, this judgment, by operation of law, necessarily extinguishes the former." With the extinguishment of the judgment, it as necessarily follows that all liens created by that judgment are extinguished with it.

The decree of the chancellor must therefore be reversed, and an order made re-instating the injunction in its original effect to abide the final decree in the cause, and the case remanded for further proceedings.

JOHN D. CARROLL *vs.* WILLIAM H. RENICH et al.

A marriage contract made in Tennessee by parties resident there at the time, and where the marriage also took place there, must be construed according to the laws of that state; it seems it would be otherwise if it were made with a view to its execution elsewhere.

By the law of Tennessee, where a slave is conveyed to one for life and on the termination of the life estate then to the heirs of the body of the tenant for life, and in default thereof, to the grantor and his heirs, the absolute right and title to the slave was vested in the tenant for life.

By a contract made in Tennessee in contemplation of marriage, certain slaves owned by the wife were conveyed to a trustee "for the use of the wife during her natural life and from the termination of that estate to the heirs of her body and their heirs forever, and in case she should die without such heirs, or having such heirs they should die before they arrive at mature age, then to her brothers by her mother's side and their heirs forever." The marriage took place, the wife died soon after giving birth to a son, who lived to be sixteen years of age and died, the husband having removed with the property to this state; it was *held*, on a bill by the brothers of the full blood of the wife, that the property by the deed of marriage settlement, vested absolutely in the wife, and on her marriage in the husband.

Limitations in marriage agreements already *executed*, are subject to the same rules that limitations contained in other instruments are; it is only in cases of marriage articles, where the settlement is thereafter to be made and the trusts are *executory* that an exception to the general rule is permitted.

By marriage agreements the marital rights are excluded only to the extent that a valid legal instrument operates to do so; where therefore a deed of settlement made in contemplation of marriage, made a limitation over of slaves to the intended wife for life, and after the life estate to the heirs of the tenant for life, and in default thereof to third parties, the limitation over being otherwise void; the fact that the slaves belonged to the wife at the time of the settlement and that the husband joined in the conveyance will not render it valid; the limitation over being void and the husband by law being entitled to all the personal property of the wife at the time of the marriage, will be entitled also to such slaves.

How far in this state a limitation in a deed after a life estate to the heirs of the body of the tenant for life, and in default thereof, to third persons, is valid and

such third persons in default of such heirs will take,—*Quære?* It seems that the proviso to the section abolishing entails, which says “provided that any person may make a conveyance or devise of lands to a succession of donees then living, and the heir or heirs of the body of the remainder-men, and in default thereof to the right heirs of the donor in fee simple.” H. & H. § 24, p. 348; and also the statutes in regard to contingent limitations and executory devices, (H. & H. 349, § 26,) alter the common law on the subject of such limitations.

On appeal from the decree of the vice chancery court held at Carrollton; Hon. Henry Dickinson, vice chancellor.

James T. Renich, William H. Renich, and Rufus Renich exhibited their bill against John D. Carroll and others, in which they aver that they were the full brothers, by the mother's side, of Rachel Renich; that in 1828 the family were residing in Hardeman county, Tennessee, and in January of that year their sister Rachel intermarried with John D. Carroll; having previously entered into a marriage contract with him. That by this marriage contract certain negro slaves named in it were granted and conveyed to James Titus, to hold as trustee the said property, subject to the following limitations and trusts, that is to say: “from and after the solemnization of said marriage to the use and benefit and behoof of the said Rachel, for and during the term and period of her natural life, and at her death to the heirs of her body and their heirs forever; and if she should die without such heirs, or having such heirs, and they should die before they arrived at mature age, then to her brothers by her mother's side, their heirs and assigns forever.”

The bill further averred that Rachel died in Hardeman county, Tennessee, in the year 1829, and had only one child, a son called Andrew J. Carroll, the only issue of the marriage, who was born shortly before his mother's death, she having died in child-bed; that Andrew J. Carroll lived about sixteen years, when he also died. That the slaves, conveyed by the marriage settlement, and their increase, were in the possession, in Carroll county, in this state, of Richmond Carroll, who had, during the life time of Andrew J. Carroll, acted as his guardian.

The complainants averred their right to these slaves by virtue of the provisions in the marriage settlement, and prayed accordingly.

The defendants demurred to the bill; and the vice-chancellor overruled their demurrer; and they declining to answer further he entered a final decree against them in accordance with the prayer of the bill, and they appealed.

Yerger and Scott for appellants.

1. If the son or heir of Mrs. Carroll had arrived at *mature age*, at the time of his death, being then sixteen years old, the property, in our view of the case, was *absolutely vested in him*, which would defeat the claim set up by the complainants.

Age is a subject of much discussion in the books, and the laws of all civilized countries have variously defined the periods of majority, minority, &c., but there is no mention of a period of "*mature age*." The period of *majority* may wear the *age of maturity*, but it does not follow that the phrase "*mature age*" means the *age of majority*. According to the rule of the common law, the period of *absolute majority*, in both sexes, is twenty-one years, and such is the rule in most of the states of this union. 2 Kent's Com. 232.

The law considers an infant of *mature age*, for many purposes, before he arrives at the age of majority, or twenty-one years. An infant at the age of fourteen, if a male, and twelve, if a female, may make a valid contract of marriage. At fourteen, he has arrived at the years of *discretion*, and may not only marry, but choose a guardian. He may act as executor at the age of seventeen. Age is the time when the law allows persons to do acts, which for want of years they were prohibited from doing before. The law, then considers them mature to do any act which it authorizes them to do, or which may be for their benefit. For some purposes a person is not mature even at the age of twenty-one. He could not be a representative in congress, before he is *twenty-five* years old; nor be a senator until *thirty*; nor president until *thirty-five*. Then it seems that a *mature age* is not a fixed and certain period in the law.

The age of majority, or twenty-one years, is not the only period of maturity known to the law.

2. But the rule in Phillips's case will govern here, by which the whole estate was vested in Mrs. Carroll. Whenever, by *deed, will, or other writing*, the ancestor takes an estate of freehold, either *legal or equitable*, and in the same instrument there is a limitation by way of remainder, (either with or without an intervening estate) of the same legal or equitable character to his *heirs or heirs of his body*, the limitation to the heirs entitles the ancestor to the whole estate.

This case, it is thought, falls within the above rule, which is fully and ably examined in the case of *Polk et al. v. Faris*, 9 Yerg. R.; to which the court is referred without further comment. 9 Yerg. R. 209.

William G. Thompson, for appellants.

1 Co. R. 104; 1 Preston on Estates, 263; *Robinson v. Robinson*, 3 Bro. Parl. C. 180; *Jesson v. Wright*, 2 Bligh's Cases in the House of Lords. There the case was of a gift to A. during his life, and to the heirs of his body, and for want of such issue, remainder over, &c. It was held in the house of lords that A. was tenant in tail, and vested with the inheritance. In that case, Lord Eldon, then chancellor, remarked, "I think it is clear that the testator intended that all the issue of the first taker should fail before the estate should go over according to the final limitation." And the case turned on that point. In the same case, Lord Redesdale remarked, "The words 'for want of such issue,' are far from being sufficient to overrule 'heirs of the body.' And the case at bar, notwithstanding the words, 'in case she should die without heirs, or having such heirs, they should die before mature age,' it was clearly intended that all the issue of the first taker should fail before the estate should go over according to the final limitation; and those words are not sufficient to overrule 'heirs of her body, and their heirs forever.'"

It will appear clearly, from an examination of the foregoing authorities, in the order in which I have cited them, that if the

deed before the court were a conveyance of real estate, the rule in Shelly's case would apply to it; that the words used would create an estate in tail. The limitation of personal estate to one in tail vests the whole in him. *Fearne* on Rem. 463; 2 *Roper* on Legacies, 393.

The deed was made in the state of Tennessee, where the parties then resided. According to the decision of the supreme court of that state, in *Polk and others v. Faris*, 9 Yerger, in which the statute of that state was construed, Mrs. Carroll took the whole estate. It was a vested interest.

William Thompson, on same side.

Sheppard, for appellees.

The rule that the words "heirs of the body" are words of limitation and not of purchase, was established in Shelley's case, because it was, according to the feudal institutions and policy, more beneficial for the lord that the heir should take by descent, and upon a presumed intention, than all the issue of the first donee, *ad infinitum*, should take. And all the cases now recognize the rule solely on the latter ground. It is regarded as a rule of evidence of intention, and not as a rule of law of so permanent and substantial nature as not to yield when a different interest is made manifest.

The case of marriage settlement is an exception to the application of the rule. 1st. Because the issue of the marriage are within the consideration of the marriage, and it is presumed the parents designed to make a provision for them. 2d. It is more beneficial for the issue to take as purchasers, as it is then without the power of the parents to defeat the provision. This exception was first made in case of *Peacock v. Spooner*, decided in 1690, on appeal to the house of lords. 2 Vern. Ch. R. 195. The doctrine of this case was recognized and sustained in *Daffom v. Goodman*, 2 Vern. 361, and *Ward v. Bradley*, Ibid. 23. *Hodgesson v. Bussey*, 2 Atk. R. 89, is a direct authority on this point, and fully covers the case at bar. The same rule is recognized and adopted in South Carolina. Case reported 1 Dessaus. R. 437, 444.

These cases were decided on the ground of presumed intention, from the nature of the contract; but the expressions and language of this settlement make the position much stronger in favor of the last donees.

1. The deed shows that Rachel Renich should not take a *greater* interest than a life estate; it gives the property to her during her natural life, and *from* and *after* the *end* and *termination* of that *estate* to the *heirs*, &c. In case of wills the rule does not apply if it is shown that the donee should not take a greater interest than an estate for life, and the same latitude of construction is adopted in construction of trusts as in wills, in favor of the intent.

2. To the words heirs, &c. further words of limitation are added, showing they were regarded as a new stock or root of inheritance.

3. The limitation to the heirs, &c. is qualified with a condition that they arrive at full age. And in order that such limitation should enure, to enlarge the prior estate the heir must take under the settlement as full and perfect an estate as he would by descent from the ancestor.

In this view the words being those of purchase the limitations may be regarded as the limitations of the fee after the death of Rachel Renich, with a double aspect, first, to the children of the marriage who arrive at the age of twenty-one, and in default of them to the appellees. That such construction is allowed, see 3 Term R. 143.

The word *such* qualifies and restrains the general expression, and avoids a perpetuity.

In *Radford v. Radford*, 15 Eng. Ch. R. 486, the general expression of *failure of issue*, preceded by a prior limitation, was held to refer to those who were to take under such prior limitation, and was not too remote.

A use may be limited in as full and ample a manner, and on same conditions as by executory devise. The conveyance of a chattel interest in trust is, in equity, regarded as a use before the statute of uses of Henry VIII. 4 Kent's Com. 301; Cruise's Digest, tit. Use and Trust.

A fee may be limited after a fee, so that it avoids a perpetuity. 4 Kent, 276.

If the words should be construed as words of limitation, which would give a fee to Rachel Renich, the last limitations could still be regarded as a shifting use, the happening of the condition, according to the whole scope and intent of the settlement being confined to the time of the death of the first taker, or twenty-one years thereafter.

This is strictly a question of intention, and the cases cited, and others arising on the construction of wills, show that the court will be astute to seize upon any circumstances to sustain the limitation.

Mr. Justice CLAYTON delivered the opinion of the court.

In the year 1828, Rachel Renich being about to intermarry with the appellant, John D. Carroll, both parties being residents of the state of Tennessee, entered into an agreement with him, by which it was stipulated that certain slaves, the property of said Rachel, should be vested in a trustee, "for the use of said Rachel, during her natural life, and from the termination of that estate, to the heirs of her body and their heirs forever, and in case she should die without such heirs, or having such heirs, they should die, before they arrive at mature age, then to her brothers by her mother's side, and their heirs forever."

The marriage took place; the only issue was one son, who died at the age of sixteen years; the mother having died soon after his birth. This bill was filed by her brothers of the full blood, who claim the property under the marriage settlement, in the events which have taken place. A demurrer was filed by Carroll, the husband, which was overruled by the vice-chancellor; and the cause brought to this court.

It is insisted, in argument, that the instrument having been executed in Tennessee, by parties resident there at the time, and the marriage having taken place there, must be construed according to the laws of that state. We concur in this view. The law of the place of the contract must determine its validity,

and govern the extent of its operation, unless it were made with a view to its execution elsewhere. Story's Con. Laws, 200, 3.

It is next contended that the supreme court of Tennessee, has settled the construction of instruments of this character, and that we must follow their decision. The case of *Polk v. Faris*, 9 Yerger, 207, is relied on as having this effect. The material words of the instrument in that case, were "to have and to hold the said property (slaves) to her during and until the full end and term of her natural life, and after the determination of that estate, then to the heirs of the body of the said Agnes Brown, lawfully issuing, and for default of such issue, lawfully begotten, then to me and my heirs forever."

The court, on the authority of the rule in *Shelly's* case, held that the whole estate vested in the first taker. The court stated the rule as defined by Mr. Preston, and abridged by chancellor Kent in his Commentaries, vol. 4, p. 215, which however hardly does entire justice to the full and comprehensive definition of the former. The rule, in the words of Mr. Preston, is, that, "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and afterwards in the same deed, will, or other writing, there is a limitation by way of remainder, with or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally, or his heirs of his body; by that name in deeds or writings of conveyance, and by that or some such name in wills, and as a class or denomination of persons, to take in succession from generation to generation; the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imported by that limitation." Prest. on Est. 263.

In legal effect there is certainly no difference between the words of the instrument in the case of *Polk v. Faris*, above cited, and those in this case. Two reasons have been assigned in argument, however, for a different construction. The first is, in the case before us the question grows out of a marriage agreement; in the other it was a deed of gift to a child.

The answer to this is, that marriage agreements already *executed*, are subject to the same rules, with limitations contained in other instruments. It is only in cases of marriage articles, where the settlement is thereafter to be made, and the trusts are *executory*, that an exception to the general rule is permitted. 1 Prest. Est. 387, 93. The doctrine is thus laid down, in a treatise upon the subject: "A settlement actually made, is construed according to the strict legal rules of construction. If, therefore, by a settlement before marriage, *without articles*, the estate is limited to the use of, or in trust for the settler for life, with remainder to the use of, or in trust for the heirs of his body, he will be considered as tenant *in tail*; though, under articles so expressed, he would only be considered as tenant for life." Atherley on Marriage Settlements, 151; 25 Law. Lib. 79. In the case before us the settlement was executed before the marriage, and there is no room for the exception.

The other reason assigned is, that the slaves belonged to the wife before marriage, and the husband joined in the conveyance. This does not vary the rule. Without a settlement, as the law stood in Tennessee, the husband would have acquired a right to all the personal property of the wife in possession at the time of the marriage. By marriage agreement the marital rights are excluded, only to the extent, that a valid legal instrument operates to do so. If the instrument transcend the limits prescribed by law, and thus defeat its own end and object, it has no effect. Under the circumstances the husband's rights in this instance must prevail.

We wish it however to be distinctly understood, that this opinion is given solely with reference to the laws of Tennessee. It is a case of first impression in this state, and we wish no misapprehension of our views on the point. We have a strong belief, that the statute of this state has changed the rule on this subject, and relieved it from the intricacy and embarrassment which have perplexed the common law and involved it in minute and subtle distinctions and refinements. The case of *Booher v. Booher*, 5 Hum., shows that in Tennessee, words

of apparently the same meaning in common parlance, with those in *Polk v. Faris*, have received a very different construction.

We extracted the rule from Preston at length, that we might place it in contrast and connection with the simple and plain provisions of our statute. The *proviso* to the section abolishing entails says, — "Provided that any person may make a conveyance or devise of lands to a succession of donees then living, and the heir or heirs of the body of the remainder-man, and in default thereof, to the right heirs of the donor in fee simple." H. & H. sect. 24, p. 348. The boundaries of such limitations are here clearly defined.

A rule not less explicit is also prescribed in regard to contingent limitations and executory devises, and a principle of construction laid down which frees these matters of much of the obscurity, which has proved so fruitful a source of litigation in other states. *Ib.* 349, sec. 26.

On the whole, the decree of the court below is reversed, and the bill dismissed.

INDEX.

ABATEMENT.

1. It is a good plea in abatement of an action *ex contractu*, that too many persons are joined as defendants; as where three persons are sued as members of a firm, and the plea in abatement sets up that the firm was composed of but two. *Gasquet v. Fisher*, 313.
2. And if a demurrer to such plea be sustained improperly, the error will not be cured by a subsequent discontinuance of the suit as to the party improperly joined; it seems it would be otherwise if the discontinuance had taken place before the decision of the demurrer. *Ib.*
3. The statute H. & H. 597, § 43, which declares that it shall be lawful for a defendant in any suit to plead as many pleas in bar of the action as he shall choose, although some of said pleas may be to the party, or to the character of the parties suing, embraces pleas in abatement. *James v. Dowell*, 833.
4. A plea in abatement to an attachment, which alleges that the defendant is a citizen of the state of Mississippi, but does not allege that he resides in the county in which the suit is instituted, and thereby show that the ordinary process of law could have been served upon him, is bad on demurrer. *Ib.*
5. The pendency of one attachment may be pleaded in abatement of a subsequent attachment, between the same parties for the same cause of action, in the same county. *Ib.*
6. If a bank in this state assign any of its evidences of debt, and the assignee bring suit thereon, the defendants can avail themselves of the benefit of the statute prohibiting the banks from assigning their evidences of debt, and requiring them to receive their own notes in payment of all debts due them, by plea in abatement only. *Com. Bank of Columbus v. Thompson*, 443.
7. By the act of 1840, the banks in this state were prohibited from transferring their evidences of debt, and were required to receive their own issues in payment of all debts due them; but if a bank does transfer a note, and

the assignee institute suit thereon in his own name, and the defendant fail to plead the transfer in abatement, he will be held to have waived his right to object to the transfer, and will be compelled to pay in gold and silver. *Robson v. Benton and Manchester Railroad and Banking Co.* 724.

ACKNOWLEDGMENT.

1. Under the statute of this state, which declares "that where the parties or witnesses to a deed reside in a foreign kingdom, state, nation or colony, the acknowledgment or proof made before any court of law, or mayor, &c. certified by the said court, mayor, &c. in the manner such acts are usually authenticated by them or him, shall be sufficient," an acknowledgment to a deed purporting to have been taken before the mayor of Liverpool, and to be his official certificate, and which bears the corporate seal, but which is not signed by that officer, but by the town clerk, is sufficient; the rule being that the certificate of the mayor of a foreign city is *prima facie* in due form or in the usual form of authenticating such acts; but it is not conclusive. *Sessions v. Reynolds*, 130.
2. Where the validity of the certificate of a state officer is called in question, its conformity to law is a question of law for the court, being regulated by a public law of the state; but the conformity of the certificate of a foreign officer to the foreign law, is a question of fact, to be established by evidence. *Ib.*
3. Where a certificate of a foreign officer is made, the certificate is *prima facie* evidence of its conformity to law, and it devolves on him who questions its admissibility, to show that it is not in the usual form, to do which he must produce an authenticated copy of the foreign law, or if that cannot be had, the best evidence which the nature of the case admits of must be produced. *Ib.*

AFFIDAVIT.

1. It seems where a demurrer to a declaration is overruled, and the defendant offers a good plea in bar of the action, with an affidavit of its truth attached to it, such affidavit will be equivalent to an affidavit of merits and the plea ought to be received. *Johnston v. Beard*, 214.
2. The substitution of depositions for oral testimony belongs to civil trials; in no state of circumstances under our constitution can a deposition of a witness be used against the accused in a criminal prosecution; and a similar rule seems to hold as to depositions of witnesses in his favor, unless by his consent; therefore where a prisoner makes an affidavit for a continuance, the state cannot force him into a trial by admitting the truth of what the alleged absent witness would depose to. *Dominges v. The State*, 475.
3. It seems that in criminal cases it should not be allowed or encouraged, except in very extreme cases, to admit what the prisoner in his application

for a continuance stated that he expected to be proved by absent witnesses ; but when such an admission has been once made, it constitutes an admission not merely that the absent witnesses would have sworn to certain alleged facts, but also that the facts alleged are absolutely true. *Ib.*

AGENT.

1. If a person deal with a party, having by law but a limited authority, he can have no right beyond what the authority rightfully exercised could confer. *Payne v. Stone*, 367.
2. Where a non-resident employs an agent in this state to introduce and sell slaves here for him, and the agent does so introduce and sell the slaves, the principal cannot recover from the agent the proceeds of their sale ; the non-residence of the principal not shielding him from the operation of our laws. *Wooten v. Miller*, 380.
3. As a general rule, an agent is a competent witness for, as well as against his principal ; but where a judgment in favor of the party calling him will procure a direct benefit to himself he is incompetent. *Poindexter v. La Roche*, 699.
4. L. filed a bill against P. to foreclose a mortgage ; P. answered that he had paid the debt secured by the mortgage to W. the agent of L. to whom as agent the mortgage was executed and the notes thereby secured given ; L. called W. as a witness to prove that the money or a large portion of it paid by P. to W. had been applied by W. without consulting P. to the payment of a debt which P. owed W. in his own right, and not the payment of the debt secured by the mortgage, and P. objected to W. as an interested and therefore incompetent witness : *Held*, that W. if permitted to testify would possess the means of securing the payment of his own demand, and also to discharge himself from liability to his principal by charging P. ; and his evidence therefore in relation to his individual transactions with P. was inadmissible. *Ib.*

AMENDMENT.

The court of chancery has power to allow amendments of the pleadings at any stage in the progress of the cause ; such amendments are in his discretion, and when made, will not be inquired into by this court. *Truly v. Lane*, 325.

AMERICAN COLONIZATION SOCIETY.

1. Where a will directs that the slaves of the testator shall be transported to Africa, under the direction and superintendence of the American Colonization Society, and that the executors should sell certain portions of the estate and pay over the proceeds to the Colonization Society, to be used by them in paying the expenses of transporting the slaves to Africa, and

for their support and maintenance when there; the trusts are not void for want of capacity in the American Colonization Society to take for such purposes. *Wade v. American Colonization Society*, 663.

2. The American Colonization Society filed a bill against the executors of R., alleging that R., by his last will, directed his slaves to be sent to Africa under the superintendence and direction of complainants, and that the executors should sell certain portions of his estate and pay over the proceeds to complainants, provided they would agree to appropriate the same to paying the expenses of transporting the slaves to Africa and supporting and maintaining them when there; that the complainants were duly and legally incorporated; that they were willing to accept and appropriate the funds, as provided for in the will, the object of the society, by their charter, being in accordance with the provisions of the will and in furtherance thereof; that by the decisions of the courts the will and provisions were fully established, and the rights of complainants to the slaves and estate, in trust as bequeathed in the will, and for the purposes therein contained, were fully confirmed, &c. The executors demurred to the bill, because there was no averment that the complainants were an incorporated society at the time of the testator's death, and because the complainants had no power or authority, under their charter, to take for the purposes and objects mentioned in the will; the chancellor disallowed the demurrer: *Held*, that the demurrer was properly disallowed. *Ib.*
3. The American Colonization Society is not prohibited by its charter from transporting slaves directed by a will to be sent to Africa under the superintendence of the society. *Ib.*
4. If an incorporation be appointed a trustee to execute trusts arising under a will, which are in themselves valid in point of law, neither the heirs of the testator nor any other private person, can inquire into or contest the right of the corporation; that could only be done by the state which granted the charter. *Ib.*

ASSIGNOR AND ASSIGNEE.

1. When an instrument not assignable is sued on, in the name of one for the use of another, the nominal plaintiff cannot discharge or release the action. Courts of law will protect the equitable right of the assignee, by compelling the nominal plaintiff to permit his name to be used for the recovery of the claim. All the nominal plaintiff can require is indemnity against costs. *Anderson v. Miller*, 586.
2. A purchaser at a sale made by an assignee in bankruptcy of the bankrupt's effects, acquires only such title as the bankrupt had at the time of his discharge; where, therefore, a bankrupt, before he filed his petition in bankruptcy, assigned a claim due to him, which was then in the hands of his attorney for collection, and the debtor was duly notified of the transfer, and the claim was, notwithstanding the transfer, included in the schedule

of the bankrupt, and sold by his assignee in bankruptcy, and afterwards paid by the debtor to the purchaser at the assignee's sale; *held*, that it was improper in the debtor to pay the purchaser at the assignee's sale, and the payment was no discharge of the debt. *Ib.*

ATTACHMENT.

1. To authorize the issuance of an attachment against the property of a non-resident of this state, under the statute H. & H. 550, § 16, it is not necessary that the affidavit should state the actual place of residence of the defendant; it is sufficient to state his non-residence, and the impossibility to serve the ordinary process of the law. *James v. Dowell*, 333.
2. In a case commenced by attachment, the defendant has a right to plead in abatement, when he appears and replevies the property attached. *Ib.*
3. A plea in abatement to an attachment which alleges that the defendant is a citizen of the state of Mississippi, but does not allege that he resides in the county in which the suit is instituted, and thereby show that the ordinary process of law could have been served upon him, is bad on demurrer. *Ib.*
4. The pendency of one attachment may be pleaded in abatement of a subsequent attachment, between the same parties for the same cause of action in the same county. *Ib.*

ATTORNEY AND CLIENT.

1. The authority of an attorney upon a general retainer to collect money, extends no further than to receive the amount in legal currency; if he accept anything else without special authority, the client may refuse to acknowledge it as a payment, and may reissue the execution; where, therefore, an attorney at law received of his client's judgment debtor the notes of third persons and receipted for them as cash to the debtor, the creditor, it was held, might still proceed with the execution against the debtor, unless the debtor could show that the attorney was authorized to make the arrangement; and the attorney's statements at the time that he was so authorized, will not be evidence of such authority; especially where the attorney in his deposition states that he has no recollection of having had a special authority. *Garvin v. Lowry*, 24.
2. Before a client can be held by acquiescence therein to have ratified the act of his attorney, which was beyond the scope of his authority as such, it must be shown that the act was made known to him and what course he adopted when informed of it. *Ib.*
3. The transfer of an attorney's receipt for a claim in his hands for collection, vests in the assignee an equitable right to the proceeds of the claim. *Anderson v. Miller*, 586.

BANKS AND BANK NOTES.

1. The failure by a bank to redeem in specie the notes which it has put into circulation, is a cause of forfeiture of its charter; where it suspends specie payments, it ceases to discharge the obligation imposed upon it by its creation, and to answer the ends for which it was instituted; and unless there be some express exemption extended to it for such failure, the state may resume its grant. *Planters Bank v. The State*, 163.
2. It seems that banks are not exempt from the rules of the common law, in regard to corporations, and the application of the law of *quo warranto* to them for forfeiture of charter; but are subject to them at least so far as to have a judgment of forfeiture entered against them for a failure to pay specie on their notes. *Ib.*
3. The decision in the case of the *Planters Bank v. The State*, 6 S. & M. 628, cited and confirmed. *Ib.*
4. The act which prohibits the banks of this state from assigning their negotiable securities, and requires them to receive their own notes in payment of all debts due them, was intended for the benefit of the debtors of the banks, and they may waive their rights under the act, if they choose to do so. Where therefore a bank assigned a note, and the assignee instituted suit, and recovered judgment thereon, without the defendants pleading the assignment in abatement, the defendants were held to have waived their right to pay in the notes of the bank. *Commercial Bank of Columbus v. Thompson*, 443.
5. If a bank in this state assign any of its evidences of debt, and the assignee bring suit thereon, the defendants can avail themselves of the benefit of the statute prohibiting the banks from assigning their evidences of debt, and requiring them to receive their own notes in payment of all debts due them, by plea in abatement only. *Ib.*
6. The assignee of a bank, in this state, instituted suit and recovered judgment, and the defendants paid the notes of the bank into court, and made a motion to have the execution which issued on the judgment, entered satisfied, and the court sustained the motion, and ordered the entry of satisfaction to be made: *Held*, that the assignee was not bound to receive the bank notes in payment, and the judgment ordering the entry of satisfaction was erroneous. *Ib.*
7. A bank which receives a note for collection, and places it in the hands of a notary in time for demand and protest, is not liable for any loss on account of the negligence of the notary. *Agricultural Bank v. Commercial Bank of Manchester*, 592.
8. A bank, in undertaking the collection of a note, becomes the agent of the owner, and is bound to use only reasonable skill and ordinary diligence; and when the note is placed in the hands of a notary for demand and protest, the notary becomes a sub-agent, for whose negligence the agent is

not responsible, if he has used reasonable diligence in his choice as to the skill and ability of the sub-agent. *Id.*

9. In an action against a bank for negligence in making such demand and protest of a note left with the bank for collection, as was necessary to fix the liability of the indorsers, the bank by showing the delivery of the note to a notary public for demand and protest, in due time, is *prima facie* exonerated from liability; and to rebut such *prima facie* case, it is not sufficient for the plaintiff to prove, in general terms, that the notary was a man of dissipated habits; he must establish the negligence more definitely, by proof that the notary was drunk at the time the note was given to him, or that his habits were so universally intemperate as to disqualify him for the discharge of an official act. *Id.*
10. The rights of parties must be determined according to the law, as it stood when the suit was commenced and process served; if therefore a party is entitled to relief at the time he institutes his suit, nothing which subsequently occurs without his instrumentality, can deprive him of that right. *Robson v. Benton and Manchester Railroad and Banking Co.* 724.
11. The act of 1840, requiring all banks in this state to receive their own issues in payment of all debts due to them, when attempted to be applied to the creditors of the banks, is in derogation of common right, and must be strictly construed. Where, therefore, the judgment creditors of a bank filed a bill against the bank and the judgment debtors of the bank, after an execution on their judgment against the bank had been returned "*nulla bona*," praying that the judgment debtors of the bank be required to pay the amount of their judgment against the bank, it was *held* that the complainants were not bound to receive the issues of the bank, or anything but gold and silver in payment of their debt; if the debtors to the bank had offered to pay the bank, or had been in readiness to do so by the possession of the notes of the bank, before the filing of the bill, the rule would have been otherwise. *Id.*
12. By the act of 1840, the banks in this state were prohibited from transferring their evidences of debt, and were required to receive their own issues in payment of all debts due them; but if a bank does transfer a note, and the assignee institute suit thereon in his own name, and the defendant fail to plead the transfer in abatement, he will be held to have waived his right to object to the transfer, and will be compelled to pay in gold and silver. *Id.*
13. R. & A. having obtained a judgment against the Benton Bank for \$1573, and the bank being insolvent, they filed their bill on the 22d day of May, 1840, to subject a judgment which the bank had recovered against Y. and others for \$4266, to the payment of the judgment, in their favor, against the bank, and enjoined Y. and others from paying their debt to the bank; at the time the injunction was granted, the notes of the bank were worth only fifty-six cents on the dollar: *Held*, that R. & A. could not be compelled to receive the issues of the bank in payment of their debt; but inas-

much as Y. and others, under the act of 1840, had the right to pay the bank in her own issues, before they were enjoined from doing so, the value of those issues at the time they were enjoined, should constitute the measure of their liability; and therefore they were entitled to a credit of one dollar on their debt to the bank, for every fifty-six cents they were required to pay R. & A., and they could not in equity be compelled to pay more than would at that rate be sufficient to discharge their indebtedness to the bank. *Ib.*

14. Where a person, on being authorized so to do, collected a debt of another in notes of a bank then current at par, with instructions to pay the proceeds, after satisfying a debt due to himself, over to a third person, and that third person directed a special appropriation of the money to another party who was willing to take the notes at par, which appropriation the holder of the notes refused to make; *Held*, that his refusal to permit the appropriation, made the subsequent holding of the notes at his own risk; and that he would be liable to the person entitled to the money, for the full amount thereof in specie, though the notes received by him had greatly depreciated. *Knigh v. Yarborough*, 179.

15. It is fully settled that no payment of an execution in anything short of lawful money, to wit, coin of the United States, will amount to a satisfaction, unless it be with the consent of the plaintiff in the execution. *Ankell v. Torrey*, 467.

16. The consent of a plaintiff, in an execution, to receive bank notes in satisfaction thereof, may be express or implied, and all facts and circumstances tending to show such consent, may legitimately be allowed to go to a jury. *Ib.*

17. A. made a motion against a sheriff and his sureties for failing to pay over money collected on an execution; and the sheriff was permitted to prove that he collected the amount of the execution in the notes of the Mississippi Union Bank, and notified the attorney of A. of that fact, and the attorney expressed no dissatisfaction respecting the character of funds collected; that about the same period A. was in the habit of receiving from his agents and attorneys at law, without objections, the same kind of funds; that Union money constituted the circulating medium of the country at that time, and it was uniformly received by clients; that the money was collected at the December term, 1839, and the motion was not made until the November term, 1843, all of which evidence was objected to by A. but was permitted by the court to go to the jury, as tending to show the consent or acquiescence of A. to the receipt of the Union money, in satisfaction of his execution; *Held*, that the evidence was legitimate, and was properly permitted to go to the jury. *Ib.*

18. Upon a motion against a sheriff and his sureties for failing to pay over money collected upon an execution, where it was proved that the amount of the execution was collected in the notes of the Mississippi Union Bank, with the consent of the attorney of the plaintiff; that Union money at

that time constituted the general circulating medium of the country, and was uniformly received by clients; that the plaintiff about the same time was in the habit of receiving from his agents and attorneys at law, without objection, large sums in the same kind of funds; that the money was collected at the December term of the court, in 1839, and the motion was not made till the November term, 1843; the court could not properly instruct the jury that there was no legal evidence that the plaintiff authorized the sheriff to receive the Union bank notes. *Ib.*

19. Where a note was payable "in the notes of the chartered banks of Mississippi *at par*," it is not competent to explain by parol the kind of funds in which the note was payable, as there was no latent ambiguity in the note; the note meaning that the notes of chartered banks were to be taken as *at par*, that is, without discount or premium. *Smith v. Elder*, 507.
20. To an action on a note, payable "in the notes of the chartered banks of Mississippi *at par*," a plea of tender in the notes of "chartered banks of Mississippi," without averring that they were "*at par*," is good. *Ib.*

BANKRUPTCY.

1. Where a suit was instituted against several defendants, in May, 1841, and a trial had, and judgment rendered against them all, in November, 1843, and there was nothing in the record showing that the verdict and judgment were incorrect; and one of the defendants filed an affidavit, as the foundation of a motion for a new trial, stating that on the day before the trial, it was agreed between the plaintiff and himself, that the case should not be tried until they could make an effort to compromise it, and he relying upon that agreement, went home, and returned the next day, and found the case in the progress of trial before the jury; and that the disposition manifested to compromise the suit, and the agreement to let the case stand, prevented him from asking leave of the court to put in a defence which had arisen since the commencement of the suit; namely, his discharge under the bankrupt law, and the motion for a new trial was overruled: *Held*, that the defence offered by the defendant went merely to his personal discharge, and not to the merits of the action; and that he had moreover been guilty of negligence, in not making application to put in his defence at the first term of the court, after his discharge occurred, for which no excuse was offered, and the court did right in overruling the motion for a new trial. *Thompson v. Williams*, 270.
2. A plea of bankruptcy, which sets forth that after the making of the promise sued on, the defendant became a bankrupt within the meaning of the statute of bankruptcy, but which sets out no discharge under the law, is bad. *Atkinson v. Fortinberry*, 302.
3. A purchaser at a sale, made by an assignee in bankruptcy, of the bankrupt's effects, acquires only such title as the bankrupt had at the time of his discharge; where, therefore, a bankrupt, before he filed his petition in bankruptcy, assigned a claim due to him, which was then in the hands of

his attorney for collection, and the debtor was duly notified of the transfer ; and the claim was, notwithstanding the transfer, included in the schedule of the bankrupt, and sold by his assignee in bankruptcy, and afterwards paid by the debtor to the purchaser, at the assignee's sale ; *Held*, that it was improper in the debtor to pay the purchaser at the assignee's sale, and the payment was no discharge of the debt. *Anderson v. Miller*, 596.

BARGAIN AND SALE.

M. purchased at marshal's sale two negroes, and sold them to H., who gave his notes for the purchase-money ; M. when the notes became due, sued H. on the notes, and recovered judgment, and H. moved for a new trial. It was proved that H. wanted to purchase the negroes for his daughter, but was unwilling to do so, unless the title of M. was good ; that M. refused to give any more than a mere quitclaim to the negroes ; that M. purchased them under an execution against A. W. H., against whom there was also another judgment, which was known to both M. and H., and its lien canvassed at the time H. was contracting with M. for the negroes ; that they both then believed that M.'s title to the negroes acquired by his purchase at the marshal's sale was paramount to the lien of the other judgment, and under that impression H. purchased the negroes and gave his notes, and received from M. his quitclaim ; and that the negroes were subsequently seized and sold under an execution which issued on the other judgment, the court overruled the motion for a new trial : *Held*, that both parties were equally cognizant of the facts relative to the title of M. to the negroes, that M. was guilty of no fraud, and the motion was properly overruled. *Hutchinson v. Minis*, 388.

BILL FOR DISCOVERY.

1. Where the answer to a bill of discovery is used, it is evidence for or against the party using it ; but the bill of discovery may be dismissed, and other evidence resorted to. *Carson v. Flowers*, 99.
2. If the party who prays for a discovery does not use the answer, it is not his evidence, and he cannot be concluded by it ; and he may introduce other evidence to establish the fact in reference to which a discovery was sought. *Id.*

BILL OF EXCEPTIONS.

1. Unless a bill of exceptions be signed by the judge, it will not, though spread out in the record, be noticed. *Graves v. Monet*, 45.
2. Where the court below rejects proof of a particular fact, which fact can only be established in a particular way, the record must show that the proof rejected was pertinent to the establishment of that particular fact in that way ; where therefore, the bill of exceptions recited that the defendant 'offered to prove' that the acknowledgment of a foreign officer was not in due form, without showing how or by what proof, and the court

below rejected the proof, it was *held*, that the record did not show that the court below had erred, and the presumption of law was in favor of its correctness. *Sessions v. Reynolds*, 130.

3. Where a bill of exceptions refers to papers without incorporating them in the bill, the high court of errors and appeals cannot notice the papers referred to. *Wadlington's ex'r v. Gary*, 522.

BILL OF EXCHANGE AND PROMISSORY NOTES.

1. A set-off must be mutual; that is, between the same parties; or as expressed in out statute, the parties "must be dealing together," otherwise it cannot be allowed. Where, therefore, W. sued B. & M. on a note payable to E. or bearer, and the defendants proposed to prove that E. transferred the note to W.; and while W. was bearer of it he was indebted to M. in a large amount by note, and had promised that M. should be allowed to credit the note sued on, on the note held by him: *held*, that the evidence was inadmissible; the individual debt of W. could not be set off against the joint debt of B. & M. *Bullard v. Dorsey*; 9.
2. F. & Co. filed a bill in the district chancery court against D. and wife, alleging that D. and wife had purchased from them a quantity of merchandise, comprising articles necessary for the use of the plantation and house-keeping purposes, for the payment of which, on a settlement of the account, they executed their joint note; that the wife of D. owned sundry slaves given to her by her mother as her separate property, which complainants prayed might be sold for the payment of the note: *Held*, that the note was not a charge on the separate property of the wife, and her slaves could not therefore be sold for the payment thereof. *Frost v. Doyle*, 68.
3. Where a separate suit was instituted against an indorser of a bill of exchange; and also a joint suit on the same bill against him and the other parties thereto, and on the same day judgments are rendered on both cases, in the separate against him, and the joint suit for him, where he plead: *Held*, that he could have no relief in equity, though the proceedings at law were irregular, as the plaintiff had no right to sue the indorser separately; yet the defendant should have appealed. *Benton v. Crowder*, 185.
4. Where the maker and indorser are sued separately since the act of 1837, and the maker give a forthcoming bond, it will not be a satisfaction of the judgment against the indorser; nothing but an actual payment of the one would be a satisfaction of the other. *Id.*
5. Where one of two partners subscribes the partnership name to a note as sureties for a third person without the authority or consent of the other partner, the latter are not bound; and it lies upon the plaintiff to prove the consent or authority of the other partners: such consent or authority may be presumed from sufficient circumstances. *Andrews v. Planters Bank*, 192.
6. V. & A. were partners in trade; V. the active partner; A. in the habit of frequenting the store, but not managing the business. V. was in the habit

- of indorsing the firm name of V. & A. and signing it as sureties for third persons, and notices of the coming due of such liabilities were often left at the store of V. & A. but it was not proved that they were brought to the knowledge of A. except in one instance, where he denied V.'s authority so to use the firm name: *Held*, that the facts were not sufficient to uphold a verdict against A. on a note signed by V. & A. as sureties. *Ib.*
7. Where A. draws a bill on B. in favor of C., and B. accepts the bill in writing and is sued upon it; he cannot show by parol evidence that the acceptance of the bill of exchange was given to C. to be obligatory upon condition that A. finished a job of work that he had undertaken for B. The acceptance is an absolute contract to pay, and it cannot therefore be shown by parol that it was not absolute. *Heaverin v. Donnell*, 244.
 8. A court of equity has jurisdiction of a bill to recover of the maker the amount of a lost note: but it seems the court will require a bond of indemnity from the complainant, not only against the note itself, but also against the damages and accumulated expenses of another suit. *Truly v. Lane*, 325.
 9. Where a bill is filed to recover the amount of a lost note, the chancellor may direct an issue to be tried by a jury to ascertain the fact of loss. *Ib.*
 10. Where, in a bill to recover the amount of a lost note, no objection was made in the court below before the hearing of a defect in parties, it is too late to urge that defect in the high court. *Ib.*
 11. N. filed a bill to obtain relief in equity against a judgment at law in favor of D. on a note which he averred he executed as a surety for the principal therein, with the understanding that D. was to be a co-surety with him; but that D. was made payee, and indorsed the note as accommodation indorser to the person for whom it was intended, and when the note became due D. took it up and sued the maker thereon at law, and obtained judgment: *Held*, that the application came too late after judgment at law; that it was concluded thereby from the defence. *Wellons v. Newell*, 399.
 12. Under the statute of this state (H. & H. 413,) limiting the period in which claims must be presented against the estates of deceased persons, and providing that on a failure to present, the claim is barred, and the estate discharged from the debt, if a creditor who holds a note against a principal and sureties, fails after the death of the principal to present it to the administrator within the prescribed time, to save the bar of the statute, the sureties are not thereby discharged. *Cohea v. Commissioners Sinking Fund*, 437.
 13. The transfer of a note, due to an estate, by the administrator in payment of his own debt, gives the assignee with notice no right of recovery.
Scott v. Searles, 498.
 14. If a note given to an administrator for the purchase of personal estate of the decedent, be transferred by the administrator in payment of his own debt, a subsequent administrator, the first having resigned his office, may file a bill in equity to enjoin the collection of the note by the assignee; and the chancery court, having entertained jurisdiction, to aid in the execution of the trust imposed on the administrator, and to prevent the multiplicity of

suits, may grant relief, and direct the note to be given up to the acting administrator. *Ib.*

15. Where a note was payable "in the notes of the chartered banks of Mississippi *at par*;" it is not competent to explain by parol the kind of funds in which the note was payable; as there was no latent ambiguity in the note; the note meaning that the notes of chartered banks were to be taken *as at par*, that is, without discount or premium. *Smith v. Elder*, 507.
16. To an action on a note, payable "in the notes of the chartered banks of Mississippi *at par*;" a plea of tender in the notes of "chartered banks of Mississippi," without averring that they were "*at par*," is good. *Ib.*
17. R. obtained judgment at law against W.; and E. alleging himself to be the owner of the judgment, obtained from W. two notes in satisfaction of it, agreeing with W. that if he were not the owner of the judgment, he would return the notes thus given to W.; whereupon the execution was returned satisfied; J. B. alleging himself to be the owner of the judgment at law, entered a motion in the circuit court to have the satisfaction set aside, which was done by that court; B. having become assignee of E. of the notes of W. received by E. as indemnity for a liability of his for E. sued W. at law on the notes, and obtained judgment; W. being prevented by high water from being at court to defend the judgment, filed a bill in chancery to be relieved from the judgment on the notes: *Held*, that the notes, having been given on a condition which had failed, were not obligatory; that the reason for not defending at law was sufficient; and that B. being assignee of the notes, merely as an indemnity, took them subject to the equities between W. & E.; and that the action of the circuit court in setting aside the entry of satisfaction, could not be collaterally questioned.
Brooks v. Whitson, 513.
18. A bank which receives a note for collection, and places it in the hands of a notary in time for demand and protest, is not liable for any loss on account of the negligence of the notary.
Agricultural Bank v. Commercial Bank of Manchester, 592.
19. A bank, in undertaking the collection of a note, becomes the agent of the owner, and is bound to use only reasonable skill and ordinary diligence: and where the note is placed in the hands of a notary for demand and protest, the notary becomes a sub-agent, for whose negligence the agent is not responsible, if he has used reasonable diligence in his choice as to the skill and ability of the sub-agent. *Ib.*
20. In an action against a bank for negligence in making such demand and protest of a note left with the bank for collection, as was necessary to fix the liability of the indorsers, the bank by showing the delivery of the note to a notary public for demand and protest in due time, is *prima facie* exonerated from liability; and to rebut such *prima facie* case it is not sufficient for the plaintiff to prove in general terms that the notary was a man of dissipated habits; he must establish the negligence more definitely by proof that the notary was drunk at the time the note was given to him, or that his

habits were so universally intemperate as to disqualify him for the discharge of an official act. *Ib.*

21. On a bill for a rescission of a contract for the purchase of land, the mere fact of the complainant's notes being outstanding, in the absence of fraud, does not, in this state, give right to a court of equity to interpose; in a state where notes are negotiable, in the mercantile sense of the term, a bill to restrain their transfer, and to compel their cancellation, might perhaps be maintained; but here, where the consideration may be inquired into, as well after assignment as before, equity would not assume jurisdiction to inquire into their validity. *Hester v. Hooker*, 768.

BILL OF INTERPLEADER.

A bill of interpleader admits the indebtedness of the complainant therein; and when one of the parties defendant withdraws all claim to the fund, a decree in favor of the other is a matter of course. *Knight v. Yarborough*, 179.

BOND FOR TITLE.

1. The interest of the vendor in land who has given a bond for title on payment of the purchase-money, and who has received a portion thereof from the vendee, is not subject to seizure and sale under execution at law at the suit of a judgment creditor who has obtained his judgment since the date of the title bond, and the payment of such portion of the purchase-money. *Money v. Dorsey*, 15.
2. Where a bond to make title on payment of the purchase-money is given, the vendor has a lien on the land for the payment thereof; and when the vendee has paid the whole or any part thereof, he has a lien on the land for the title, which will prevail against the lien of judgment creditor of the vendor whose judgment is subsequent to the agreement to convey and the receipt of the consideration money; it seems, however, that the lien of such vendee will not prevail against a *bona fide* purchaser from the vendor subsequent to the date of the title bond and payment of portion of the purchase-money, for a valuable consideration and without notice. *Ib.*
3. The extent of the right of a judgment creditor of the vendor of real estate, who has given a bond for title on payment of the purchase-money, and received a portion thereof, is to subject the unpaid purchase-money in the hands of the vendee to the satisfaction of his judgment. *Ib.*
4. The lien of a judgment operates only on the interest of the judgment debtor at the date of its rendition; and cannot therefore prevail against the prior equitable lien of a vendee from such judgment debtor who has received from his vendor a bond for title and paid part of the purchase-money; though his bond for title has never been recorded. *Ib.*
5. M. bought a piece of land from P. and paid part of the price in cash, and received a bond for title on payment of the residue; S. afterwards sold the same land to C., who resold it to M.; subsequent to the sale by P. to M.,

but before the sale by P. to C., a judgment was recovered by D. against P. and execution thereon levied on the same land; *held*, that M. was entitled to an injunction against the sale; that P. had not an interest capable of sale under execution, and was a mere trustee of the title for M., whose interest was not affected by the sale to C., though it might have been otherwise if C. had set up that he was a *bona fide* purchaser for a valuable consideration without notice of the previous sale to M. *Ib.*

6. A declaration of a vendee who has received from his vendor a bond to make title on payment of the purchase-money, against the obligor therein for a failure to make title, is fatally defective, which neither avers that "the vendee demanded a deed of the vendor," nor that "the vendee prepared a deed and tendered it to the vendor, and demanded its execution." *Johnston v. Beard*, 314.
7. Whether the vendee who has a bond for title on payment of the purchase-money, can maintain an action against his vendor for a failure to make title after having demanded a deed of the vendor, or whether he must have prepared a deed and tendered it to the vendor and demanded its execution — *quære?* *Ib.*
8. Courts will construe covenants to be dependent, unless a contrary intention clearly appears; in an action, therefore, on a note given for land, to which the vendee received a bond for title to be made when the purchase-money was paid, and that was payable in instalments, the right to enforce payment is not distinct and independent from the inability to make title, and the defendant may set up and show in bar of the action on the notes a want of title in the vendor. *Peques v. Mosby*, 340.
9. McG. purchased of the board of police of the county of Ponola, a lot in the town of Ponola, and took a bond for title when the last instalment on the lot was paid; McG. sold the lot to W. and assigned him the title-bond, without any covenants on his part, W. contracting to pay the last instalment due by McG. to the board of police; E. under a judgment recovered by him against McG. after the assignment of the title-bond to W. had the lot sold by the sheriff, and bought it himself, having full notice of the assignment of the bond to W.; E. then procured the board of police, by their president, to execute direct to him a deed to the lot, and he paid them the last instalment due by McG., and which W. had assumed the payment of, the board of police having notice also of the assignment of the bond to W.; E. obtained possession of the lot, and put improvements upon it; W. filed a bill to have the deed to E. from the president of the board of police set aside and cancelled, and for a specific performance of his contract with the board of police: *Held*, that W. was entitled to the relief sought, but that E. had a lien on the lot for the instalment paid by him to the board of police, and that he should be allowed for his improvements, to be applied to the extinction of the rent, so far as they will go. *Ellis v. Ward*, 651.

CHAMPERTY.

1. Whether, if a tenant in common be ousted by his cotenant, he may lawfully convey his interest in the premises, or whether the deed will be void for champerty. *Quære?* Yet if an action by those claiming under one tenant in common against those claiming under the other, the court instruct the jury, that if the deed from the tenant, under whom the plaintiff claims, was made after the ouster by his cotenant, the deed was void for maintenance, and the jury find for the plaintiff, the verdict will not be disturbed at the instance of the defendant. *Harmon v. Jones*, 111.
2. There are no statutes on the subject of champerty in this state; the English statute of 32 Hen. VIII. c. 9, on that subject, is not in force here; in order therefore to avoid a contract on the ground of champerty, the common law offence must be complete; to constitute which it must not only be proved that there was adverse possession at the time of sale, but that the purchaser had knowledge of such adverse possession; this is especially the case where the land granted was in forest and wild at the time of the grant.

Sessions v. Reynolds, 130.

CHANCERY.

1. If the answer of a defendant to a bill in chancery be made a cross-bill, the answers of the complainant to the interrogatories propounded in the cross-bill are good evidence in favor of the complainant.
Money v. Dorsey, 15.
2. After distribution of the estate of a deceased person under an order of the probate court, the superior court of chancery has not jurisdiction of a bill by a person alleging himself to be a distributee, whose claims had been overlooked or disregarded in the distribution in the probate court, against one of the other distributees to recover from him a ratable proportion of the estate. The remedy was in the probate court. *Gaines v. Smiley*, 53.
3. After judgment at law, equity cannot interpose to set it aside, upon grounds which might have been used as a defence at law, unless it were obtained by fraud. *Benton v. Crowder*, 185.
4. Where a separate suit was instituted against an indorser of a bill of exchange; and also a joint suit on the same bill against him and the other parties thereto, and on the same day judgments are rendered on both cases, in the separate against him and the joint suit for him where he plead; *held*, that he could have no relief in equity, though the proceedings at law were irregular, as the plaintiff had no right to sue the indorser separately; yet the defendant should have appealed. *Id.*
5. A vendee in possession under a deed with warranty, with no fraud made manifest, and with nothing to show that the vendor is not able to pay any damages that may be recovered against him, has no right to call his

- vendor into a court of equity to litigate an adverse legal title; he must rely on his covenants if he should be evicted. *Vick v. Percy*, 256.
6. A court of equity has jurisdiction of a bill to recover of the maker the amount of a lost note; but it seems the court will require a bond of indemnity from the complainant not only against the note itself, but also against the damages and accumulated expenses of another suit.
Truhy v. Lane, 325.
7. Where a bill is filed to recover the amount of a lost note, the chancellor may direct an issue to be tried by a jury to ascertain the fact of loss. *Ib.*
8. Where, in a bill to recover the amount of a lost note, no objection was made in the court below before the hearing, of a defect in parties, it is too late to urge that defect in the high court. *Ib.*
9. The court of chancery has power to allow amendments of the pleadings at any stage in the progress of the cause; such amendments are in his discretion, and when made will not be inquired into by this court. *Ib.*
10. In an action on a note given for land, in which the defendant, under the plea of non assumpsit, offered proof to show that the plaintiff had not title to the land for which the notes were given, it is not competent for the plaintiff to show by parol, that there was a mistake in the description of the land in the title bond; and that the defendant was really put into possession of the land sold and had enjoyed it ever since; such proof may be made in a court of equity, but not of law. *Peques v. Mosby*, 340.
11. It seems that it is improper to allow a supplemental bill which contains nothing that was not fully known to the complainant at the time he filed his original bill; but if such a supplement be filed, and be not objected to in the court below, and the chancellor entertain jurisdiction of it, the objection will not prevail in this court. *Walker v. Gilbert*, 456.
12. Fraud vacates all contracts, and whenever it is charged, must be answered; yet if the fraud be charged in a case which will not justify the rescission of the contract, or in a case in which the court cannot give relief, it need not be answered. *Ib.*
13. Where E. sold a tract of land to P. representing that the title was unincumbered, though at the time it was largely incumbered, and P. gave a note to E. for the purchase-money, with W. as his surety; and the assignee of E. sued P. and W. at law upon the note, and obtained judgment; and W. filed a bill in chancery to enjoin the judgment at law, on the ground of the fraud committed by E. on P. in the sale of the property, and did not make P. a party to the bill, and P. did not complain of the judgment at law; held, that W. was not entitled to be relieved therefrom. *Ib.*
14. The interpretation of the chancellor of the rules of his court, are a safe precedent for this court; and where, notwithstanding a rule of practice that no motion to discharge an injunction on the face of the bill, would be received, yet, if the chancellor entertain such motion, it will be considered that the chancellor considered the rule inapplicable to the case; and it seems

that such a rule ought not to apply to a case where no decree could be made, if the facts were admitted. *Ib.*

15. If a note given to an administrator for the purchase of personal estate of the decedent, be transferred by the administrator, in payment of his own debt, a subsequent administrator, the first having resigned his office, may file a bill in equity to enjoin the collection of the note by the assignee; and the chancery court having entertained jurisdiction to aid in the execution of the trust imposed on the administrator, and to prevent the multiplicity of suits, may grant relief, and direct the note to be given up to the acting administrator. *Scott v. Searles*, 498.
16. It is well established, that, if a party has a knowledge that he has been defrauded, and yet subsequently confirms the original contract by making new agreements and engagements respecting it, he thereby waives the fraud, and abandons his claim to equitable relief.

Edwards v. Roberts, 544.

17. E. purchased of R. certain lands, and took a bond for title; and becoming apprehensive that R. would not be able to make a good title to all of the land embraced in the purchase, he instituted suit on the bond; pending the suit, it was agreed between the parties to submit to arbitration, the amount to be allowed E. in the premises; the arbitrators not being able to agree, E. and R. determined to divide the difference that subsisted between arbitrators, and an award was made accordingly; which was recorded as a part of the proceedings in the action on the title bond, and entered as the judgment of the court; and E. gave to R. a new note in accordance with the terms of the award: *Held*, that whatever might have been E.'s equitable right to relief on account of fraud practised upon him in the sale of the land, by consenting to abide the result of an arbitration upon the matters in dispute, and giving a new note in accordance with the terms of the award, he virtually reaffirmed the contract, and relinquished any right to relief he might have previously possessed. *Ib.*
18. W. leased to J. a tract of land for ninety-nine years, and placed J. in possession, J. being fully acquainted with the nature of W.'s title at the time; J. afterwards refused to comply with his contract, and abandoned the possession of the premises; whereupon W. sued him, and recovered judgment at law for the consideration of the lease. J. then filed a bill to set aside the lease, recover back the money he paid on it, and to enjoin perpetually the judgment, on the ground of the statute of frauds and the defect of W.'s title; it was shown that W. was wholly divested of title between the date of the lease and the filing of the bill, but that his title was perfect at the time the bill was filed; no fraud was proved against W.; and the vice-chancellor dismissed the bill: *Held*, that J. showed no equitable grounds of relief, and his bill was therefore properly dismissed.

Jenkins v. Whitehead, 577.

19. It is well settled in courts of equity, as well as law, that a party is not

entitled to relief after verdict, upon testimony, which with ordinary care and diligence he might have procured and used upon the trial at law.

Lee v. Hooker, 601.

20. L. sued H. in an action of assumpsit for medical services, and recovered a judgment; H. some time thereafter, filed a bill in chancery, praying for an injunction, and a new trial, upon the ground of evidence discovered since the trial at law, which newly discovered evidence consisted of the opinions of physicians as to the nature of the disease under which H. was suffering, without showing any good reason why those opinions were not procured before the trial at law: *Held*, that an ordinary degree of diligence would have brought to light the newly discovered evidence as well before the trial as since; and that the injunction should be dissolved, and the bill dismissed. *Ib.*
21. A bill to set aside a sale of land, under execution, making the several purchases at the sale, though they bought different and distinct interests, and the plaintiffs in the execution, under which the sale was made, all defendants, is not multifarious, on account of the improper joinder of parties.
DeLafield v. Anderson, 630.
22. If trusts which arise under a will be of a character that require equitable interposition, the fact that they were created by a will cannot exclude the jurisdiction of equity. *Wade v. American Colonization Society*, 663.
23. If the probate court cannot grant full and adequate relief, in cases of trust arising under a will, the chancery court may take jurisdiction. *Ib.*
24. R., by his will, directed that after his decease his slaves should be called together, and such of them as elected to go to Africa, the provisions of the will being first fully explained to them, should be sent there under the directions and superintendence of the American Colonization Society; that such of his slaves as did not elect to go to Africa, together with all the residue of his estate, except a few slaves, particularly mentioned, should be sold, and the proceeds after the payment of certain legacies, and all necessary expenses, be paid over to the American Colonization Society, to be appropriated first to paying the expenses of transporting his slaves to Africa, and secondly to their support and maintenance when there; the executors refused to sell any portion of the estate, or deliver the slaves to the American Colonization Society, as directed by the will, because, as they contended, the trusts created by the will were in violation of the policy of this state, and in fraud of the statute on the subject of manumission, and therefore illegal and void, and the American Colonization Society filed a bill in the superior court of chancery against the executors, to compel the execution of the trusts and to carry out the provisions of the will; the executors resisted the bill on the further ground that it related to a matter purely of administration, and cognizable only in the probate court. *Held*, that the trusts created by the will were legal and valid; that the full measure of relief could only be attained in a court of equity, and therefore the court of chancery had jurisdiction. *Ib.*

25. It is only where the bequest or devise is too vague or indefinite for those intended to be benefited to claim any interest under them, that the doctrine as to charities arises: definite charities are trusts, which equity will execute by virtue of its ordinary jurisdiction. *Ib.*
26. Whether the Statute 43 Elizabeth is in force in this state; and whether the court of chancery has any jurisdiction over charities, to compel their performance, apart from and independent of that statute, — *Quere? Ib.*
27. Where a testator directs in his will that his slaves shall be transported to Africa, under the superintendence of the American Colonization Society, and that the executors shall sell certain portions of the estate and pay over the proceeds to the society, to be applied by them to the payment of expenses incurred in transporting the slaves to Africa, and supporting them when there, both the executors and the society are constituted trustees; it is the duty of the executors to deliver the slaves to the society for the purposes of the will; and it is the duty of the society to carry out those purposes; and if the executors will not discharge their duty, and interpose obstacles to the execution of the trust by the society, clearly a court of equity may enforce the performance. *Ib.*
28. If the record shows that the counsel of both parties consented that a commissioner, appointed by the chancellor to take and state an account between the parties, should proceed to take the account, and there is no evidence that such consent was intended to give the commissioner authority also to proceed to settle his report without further notice to the parties, and he does proceed to settle his report without notice, and exceptions are filed to his report for the want of notice, the exceptions should be sustained, and the case recommitted to the commissioner. *Poindexter v. La Roche*, 699.
29. Where a cause was referred to S. & F. or either of them, to state an account between the parties, and S. alone stated the account, and his report was excepted to, and the exceptions sustained, and the cause recommitted to "the commissioner;" *held*, that S. was the commissioner to whom the recommitment was made, and a report therefore made by F. upon the recommitment might properly be excepted to. *Ib.*
30. Where a case is referred to a commissioner to state an account between the parties, and one of the parties files exceptions to the report of the commissioner, and the chancellor refers the exceptions to a master commissioner, who overrules all the exceptions, and the report of the master commissioner is confirmed by the chancellor, without any exceptions being taken thereto, the party who filed the exceptions to the report of the first commissioner, is not thereby concluded, but he may avail himself of the benefit of those exceptions in the high court of errors and appeals. *Ib.*
31. A bill for a specific performance or for the rescission of a contract is addressed to the sound discretion of the court: no certain, definite rule can be laid down, which would determine when a party was or was not entitled to such relief. Where a complainant seeking the rescission of a contract has not

done all that he stipulated to do, or has not placed himself in a situation to be ready to do so, upon compliance on the other side, the court will not interpose in his behalf. *Hester v. Hooker*, 768.

32. On a bill for a rescission of a contract for the purchase of land, the mere fact of the complainant's notes being outstanding, in the absence of fraud, does not, in this state, give right to a court of equity to interpose; in a state where notes are negotiable, in the mercantile sense of the term, a bill to restrain their transfer, and to compel their cancellation, might perhaps be maintained; but here, where the consideration may be inquired into, as well after assignment as before, equity would not assume jurisdiction to inquire into their validity. *Ib.*
33. Where a party sold land and gave a bond for title, and also stipulated to deliver possession of the land upon the payment of a portion of the purchase-money on a particular day; the purchaser failed to pay the money at the time specified, and the owner of the land subsequently sold it to a third person, and delivered possession to him; the latter sale was rescinded, and the owner filed a bill to compel a specific performance of the first contract: *Held*, that by the latter sale the vendor placed himself in a situation, in which he was not entitled to a decree for a specific performance against the first purchaser. *Ib.*
34. Hooker sold to Hester a tract of land and executed a title bond, in which he stipulated that he would surrender possession of the premises on the 1st day of September, 1838, upon the payment by Hester before that time of one of the notes given by him for the purchase-money, it being distinctly stated in the bond that the payment of the money should precede the delivery of possession; Hester failed to pay the money, and in October, 1838, Hooker sold the same land to Young, and delivered possession of the premises to him; the sale to Young was rescinded, and Hester subsequently filed a bill for a rescission of his contract with Hooker, and for a cancellation of his notes, which were still outstanding; Hooker filed a cross bill to compel a specific performance of the contract, alleging a readiness upon his part to comply with the terms of the contract: *Held*, that both the original bill and cross-bill should be dismissed, and the parties left to their legal remedies. *Ib.*
35. Where an actual settler, claiming a preëemption right, has fully complied with the requisitions of the law, and received a patent, his title must be regarded as superior in a court of equity, to any title acquired by mere entry and a patent on it, although it be older than the patent under the preëemption right; the patent relates to the inception of title, and in a court of equity, the person who has first appropriated has the best title.

McAfee v. Keirn, 780.

CHARITABLE BEQUESTS.

1. It is only where the bequest or devise is too vague or indefinite, for those intended to be benefited, to claim any interest under them, that the doctrine

as to charities arises; definite charities are trusts, which equity will execute by virtue of its ordinary jurisdiction. *Wade v. American Colonization Society*, 663.

2. Whether the statute 43 Elizabeth is in force in this state; and whether the court of chancery has any jurisdiction over charities, to compel their performance, apart from and independent of that statute. *Quære? Ib.*

CIRCUIT COURT.

1. The statutes passed by the legislature for the regulation of proceedings in chancery, are to be applied to such suits in the circuit courts; final decrees, therefore, may be entered by the circuit courts at the same term a bill is taken for confessed, such course being authorized by the statute in regard to the superior court of chancery. *Dowell v. Sanders*, 206.
2. Whether the rules of the chancery court adopted by the chancellor, are applicable to equity causes in the circuit courts. *Quære. Ib.*
3. Cases brought from justices of the peace into the circuit court, may be tried in the latter court, without any written pleadings whatever. *Hairdon v. Francher*, 249.
4. Although the proceedings in causes brought from justices of the peace to the circuit court are *de novo*, and can be conducted without any pleadings whatever; yet if the parties undertake to conduct and carry on the cause by the means of pleadings in writing, they will be held to the rules of pleading. *Atkinson v. Fortinberry*, 302.

CLERK OF CIRCUIT COURT.

1. The official duties of a clerk of the circuit court embrace every act that the law requires him to perform in virtue of his office; the issuance therefore of a writ of error is an official act, and so also is his taking bond with two or more sufficient sureties upon the issuance of such writ. *McNutt v. Livingston*, 641.
2. The clerk of the circuit court is liable upon his official bond for issuing a writ of error and a supersedeas without taking from the defendant in the judgment, bond conditioned according to law, with two or more sufficient sureties; in such case the bond may be sued on by any person injured, and a recovery be had to the amount of the penalty thereof. *Ib.*
3. Whether the law makes the clerk of a circuit court guarantee the sufficiency of the sureties on a bond taken by him upon the issuance of a writ of error and a supersedeas,—*Quære? Ib.*
4. The granting of a writ of error by the clerk of a circuit court in pursuance of the statute H. & H. 541, is a ministerial, and not a judicial act. *Ib.*
5. By law the clerk of the circuit court may appoint deputies, but the deputy is responsible to the clerk alone, and the clerk is liable to parties who may be injured by the acts of the deputy, as the acts of the deputy are the acts of the principal. *Ib.*

6. In an action against the clerk of the circuit court and his sureties on his official bond, for the failure of the clerk to take a bond with two or more sufficient sureties upon the issuance by him of a writ of error and a supersedeas, it is no answer to the sufficiency of the declaration to say that the erroneous conclusion of the clerk in regard to the sufficiency of the sureties is no breach of his bond; nor in deciding upon the sufficiency of the declaration is the fact that the sheriff had made a sufficient levy, which was not discharged by the supersedeas, a proper subject of inquiry. *Ib.*

COLLATERAL SECURITY.

Where a person, on being authorized so to do, collected a debt of another, in notes of a bank then current at par, with instructions to pay the proceeds (after satisfying a debt due to himself,) over to a third person; and that third person directed a special appropriation of the money to another party, who was willing to take the notes at par, which appropriation the holder of the notes refused to make; *held*, that his refusal to permit the appropriation made the subsequent holding of the notes at his own risk; and that he would be liable to the person entitled to the money for the full amount thereof in specie, though the notes received by him had greatly depreciated.

Knight v. Yarrowburgh, 179.

COMMISSIONER.

1. If the record shows that the counsel of both parties consented that a commissioner appointed by the chancellor to take and state an account between the parties, should proceed to take the account, and there is no evidence that such consent was intended to give the commissioner authority also to proceed to settle his report without further notice to the parties, and he does proceed to settle his report without notice, and exceptions are filed to his report for the want of notice; the exceptions should be sustained and the case recommitted to the commissioner. *Poindexter v. LaRoche*, 699.
2. Where a cause was referred to S. and F. or either of them, to state an account between the parties, and S. alone stated the account, and his report was excepted to and the exceptions sustained and the cause recommitted to "the commissioner;" *held*, that S. was the commissioner to whom the recommitment was made, and a report therefore made by F. upon the recommitment might properly be excepted to. *Ib.*
3. Where a case is referred to a commissioner to state an account between the parties, and one of the parties files exceptions to the report of the commissioner, and the chancellor refers the exceptions to a master commissioner, who overrules all the exceptions, and the report of the master commissioner is confirmed by the chancellor without any exceptions being taken thereto, the party who filed the exceptions to the report of the first commissioner, is not thereby included, but he may avail himself of the benefit of those exceptions in the high court of errors and appeals. *Ib.*

COMMISSIONER OF INSOLVENCY.

1. After the report of the commissioners of insolvency has been received and allowed, the probate court cannot, at a subsequent term, open it for any cause, unless the former orders were null and void.

Dahlgren v. Duncan, 280.

2. The case of *Robins v. Norcum*, 4 S. & M. 332, declaring the want of jurisdiction of the probate court of a petition by a creditor of an estate, after the report of the commissioner of insolvency is allowed, to settle conflicting rights between creditors, cited and confirmed. *Id.*

COMMISSIONER'S REPORT AND SALE.

1. There is no rule of the circuit court requiring a commissioner to whom an account is referred to state and report the amount due the complainant in a bill to foreclose a mortgage, to give the defendant notice of the time and place of taking the account; yet if no such notice be given, and the defendant object to a confirmation of the commissioner's report on that ground, and at the same time shows any good reason for a recommitment of the account, the objection should be sustained and the recommitment made. But if the defendant permits the commissioner's report to be confirmed by the court without objections; he must be taken to have waived any he may have had to it. *Sanders v. Dowell*, 206.
2. It is necessary that a sale of mortgaged premises made by a commissioner under a decree of foreclosure should be confirmed by the court. *Id.*

COMMON LAW.

It seems that the English statutes, as far back as the 32 Hen. VIII., are not in force in this state. *Sessions v. Reynolds*, 130.

CONSTITUTION OF STATE.

1. In 1837, D. M. a citizen of North Carolina, placed in the possession of W., about to move to the state of Mississippi, a negro man to be sold or hired for him; W. brought the slave to this state, and sold him here to M. on a credit, and took M.'s note, and transferred it to his father in payment of a debt due by him to his father; the note was afterwards paid; and D. M. sued W. and his father in equity to recover the money, charging them with a fraudulent combination to cheat him out of it: *Held*, that the complainant was not entitled to recover; the introduction of the slave into this state was in violation of the law and constitution, and any contract, growing out of, or connected with, such violation, will not be enforced.

Wooten v. Miller, 380.

2. Where a non-resident employs an agent in this state to introduce and sell slaves here for him; and the agent does so introduce and sell the slaves, the principal cannot recover from the agent the proceeds of their sale; the

non-residence of the principal not shielding him from the operation of our laws. *Ib.*

CONTINUANCE.

An application for a continuance is addressed to the discretion of the court, and if it be refused, cannot generally be assigned as error.

Bohr v. Steamboat Baton Rouge, 715.

CONTRACT.

1. In 1837, D. M., a citizen of North Carolina, placed in the possession of W., about to move to the state of Mississippi, a negro man to be sold or hired for him; W. brought the slave to this state and sold him here to M. on a credit, and took M.'s note, and transferred it to his father in payment of a debt due by him to his father; the note was afterwards paid; and D. M. sued W. and his father in equity to recover the money, charging them with a fraudulent combination to cheat him out of it: *Held*, that the complainant was not entitled to recover; the introduction of the slave into this state was in violation of the law and constitution, and any contract, growing out of, or connected with, such violation, will not be enforced.

Wooten v. Miller, 380.

2. Where a non-resident employs an agent in this state to introduce or sell slaves here for him, and the agent does so introduce and sell the slaves, the principal cannot recover from the agent the proceeds of their sale; the non-residence of the principal not shielding him from the operation of our laws. *Ib.*

3. If the contract of a foreigner is to be completed in, or has reference to its execution in, a foreign country, and is repugnant to the laws of that country, he is bound by them. *Ib.*

4. M. purchased at marshal's sale two negroes, and sold them to H., who gave his notes for the purchase-money; M., when the notes became due, sued H. on the notes and recovered judgment, and H. moved for a new trial: it was proved that H. wanted to purchase the negroes for his daughter, but was unwilling to do so unless the title of M. was good; that M. refused to give any more than a mere quitclaim to the negroes; that M. purchased them under an execution against A. W. H., against whom there was also another judgment which was known to both M. and H., and its lien canvassed at the time H. was contracting with M. for the negroes; that they both then believed that M.'s title to the negroes, acquired by his purchase at the marshal's sale, was paramount to the lien of the other judgment, and under that impression H. purchased the negroes, and gave his notes, and received from M. his quitclaim; and that the negroes were subsequently seized and sold under an execution which issued on the other judgment. The court overruled the motion for a new trial: *Held*, that both parties were equally cognizant of the facts relative to the title of M. to the negroes; that M. was guilty of no fraud; and the motion was properly overruled *Hutcheson v. Minis*, 288.

5. If a purchaser of real estate has protected himself by covenants, he is not entitled to be relieved from his contract if it be unmixed with fraud, until after eviction. *Walker v. Gibbert*, 456.
6. Where E. sold a tract of land to P., representing that the title was unincumbered, though at the time it was largely incumbered, and P. gave a note to E. for the purchase-money with W. as his surety, and the assignee of E. sued P. and W. at law upon the note and obtained judgment; and W. filed a bill in chancery to enjoin the judgment at law on the ground of the fraud committed by E. on P. in the sale of the property, and did not make P. a party to the bill, and P. did not complain of the judgment at law: *Held*, that W. was not entitled to be relieved therefrom. *Ib.*
7. W. (in debt) and H. (possessed of large property), being about to marry, by deed of settlement before the marriage, conveys to a trustee for H.'s sole and separate use, all her property, and the interest, income and proceeds thereof on trust: 1. For the use of W. and H. for their natural lives, subject to disposal by H. by will. 2. That H. should have, during her life, full control over the property, and that it should not be subject to W.'s debts or his control. 3. That the trustee might sell when requested: *Held*, that W. on the death of H. had no right in the property thus conveyed, or to a participation in the proceeds, income, or profits of it.
Williams v. Claiborne, 488.
8. Where a note was payable "in the notes of the chartered banks of Mississippi *at par*," it is not competent to explain by parol the kind of funds in which the note was payable; as there was no latent ambiguity in the note; the note meaning that the notes of chartered banks were to be taken as at par, that is, without discount or premium. *Smith v. Elder*, 507.
9. B. made a note with H. and others, as sureties thereon, to a bank; when it became due, B. wished to renew it; but the bank would not permit the renewal to be made without the payment of a portion of the amount due and additional security given; B. to obtain the renewal, paid the sum required by the bank, and requested C. to go on the note to be given in renewal, having previously obtained the names of the parties who were bound on the first note, and C. did so; judgment was obtained on the last note, and H. paid the money and filed a bill against C. for contribution. *Held*, that C. was not a co-surety with H. and others for B., but a surety for B. and his original sureties, and therefore not liable for contribution to H. *Hunt v. Chambliss*, 532.
10. It is well established, that if a party has a knowledge that he has been defrauded, and yet subsequently confirms the original contract by making new agreements and engagements respecting it, he thereby waives the fraud and abandons his claim to equitable relief. *Edwards v. Roberts*, 544.
11. E. purchased of R. certain lands and took a bond for title, and becoming apprehensive that R. would not be able to make a good title to all of the land embraced in the purchase, he instituted suit on the bond; pending the suit, it was agreed by the parties to submit to arbitration the amount to be al-

lowed E. in the premises: the arbitrators not being able to agree, E. & R. determined to divide the difference that subsisted between arbitrators; and an award was made accordingly, which was recorded as a part of the proceedings in the action on the title bond, and entered as the judgment of the court, and E. gave to R. a new note in accordance with the terms of the award: *held*, that whatever might have been E.'s equitable right to relief, on account of fraud practised upon him in the sale of the land, by consenting to abide the result of an arbitration upon the matters in dispute, and giving a new note in accordance with the terms of the award; he virtually reaffirmed the contract, and relinquished any right to relief he might have previously possessed. *Ib.*

12. If the owner of land through which a company wishes to run a railroad, agree to refer to arbitrators the question of damages to be paid by the company for the right of way, and there be no express agreement that time shall be given for the payment of the damages awarded; the damages must be paid, before the right of way can vest in the company.

Stewart v. Raymond Railroad Company, 568.

13. He who seeks to compel a specific performance of a contract, must do all that is incumbent upon him, or he cannot succeed. Where, therefore, a railroad company agreed with the owner of land to refer to arbitrators the question of how much the company shall pay him for the right of way over his land, they cannot prevent him from the exercise of full ownership over the land until they have paid, or tendered to him the damages awarded. *Ib.*

14. A purchaser of land who, at the time of purchase, executed a deed of trust to secure the purchase-money, cannot convey to a company, even an easement over the land, except subject to the payment of the purchase-money; when therefore such a purchaser did convey to a company an easement over the land, and the land was subsequently sold under the deed of trust, and the purchaser at the trust sale, agreed with the company to refer to arbitrators the question of damages they should pay him for the enjoyment of the easement; it was *held*, that the company were not entitled to an indefinite credit for the payment of the damages awarded, and to the enjoyment of the easement, until the payment of the money; but that they were bound to pay, or tender the amount of damages before they could have any right to the enjoyment of the easement. *Ib.*

15. W. leased to J. a tract of land for ninety-nine years, and placed J. in possession; J. being fully acquainted with the nature of W.'s title at the time; J. afterwards refused to comply with his contract, and abandoned the possession of the premises; whereupon W. sued him, and recovered judgment at law for the consideration of the lease. J. then filed a bill to set aside the lease, recover back the money he paid on it, and to enjoin perpetually the judgment, on the ground of the statute of frauds and the defect of W.'s title; it was shown that W. was wholly divested of title between the date of the lease and the filing of the bill; but that his title was perfect at the

time the bill was filed; no fraud was proved against W.; and the vice-chancellor dismissed the bill: *Held*, that J. showed no equitable grounds of relief, and his bill was therefore properly dismissed.

Jenkins v. Whitehead, 577.

16. A deed of trust made by P. to secure all judgments outstanding and unsatisfied against P. or the firm of B. & P., cannot be held to embrace a judgment against L. & P. *Lauderdale v. Hallock*, 622.

17. P. executed a deed of trust to secure, first, all judgments outstanding and unsatisfied against P. himself, or B. & P.; secondly, a note to C. executed by L. & P. and indorsed by S. P. L. and others, and after that to pay certain other specified debts; H. & B., who held an unsatisfied judgment against L. & P., filed a bill to recover from S. D. L. about \$1300, paid to him out of the trust fund on account of the note to C., alleging that by the terms of the deed of trust they were preferred to S. D. L. or to C.; it was proved by the draftsman of the deed of trust, who was also one of the attorneys who recovered the judgment in favor of H. & B., that the judgment of H. & B. was not intended to be secured by the deed of trust; and if the words of the deed embraced that judgment, it was a mistake of the draftsman of the deed: *Held*, that the judgment of H. & B. was not secured by deed of trust, and their bill should be dismissed.

Lauderdale v. Hallock, 622.

18. The rights of parties must be determined according to the law, as it stood when the suit was commenced and process served; if therefore a party is entitled to relief at the time he institutes his suit, nothing which subsequently occurs without his instrumentality, can deprive him of that right. *Robson v. Benton and Manchester Railroad and Banking Co.* 724.

19. Where a conveyance intended as an indemnity to sureties and also as a security for the payment of the debt, describes the grantees as *indorsers*, when in fact they signed their name on the face of the note as *sureties*, the description will be considered as substantially correct.

Ross v. Wilson, 753.

20. A bill for a specific performance or for the rescission of a contract is addressed to the sound discretion of the court: no certain, definite rule can be laid down, which would determine when a party was or was not entitled to such relief. Where a complainant, seeking the rescission of a contract, has not done all that he stipulated to do, or has not placed himself in a situation to be ready to do so, upon compliance on the other side, the court will not interpose in his behalf. *Hester v. Hooker*, 768.

21. On a bill for a rescission of a contract for the purchase of land, the mere fact of the complainant's notes being outstanding, in the absence of fraud, does not, in this state, give right to a court of equity to interpose; in a state where notes are negotiable, in the mercantile sense of the term, a bill to restrain their transfer, and to compel their cancellation, might perhaps be maintained; but here, where the consideration may be inquired into, as well after assignment as before, equity would not assume jurisdiction to inquire into their validity. *Id.*

22. Where a party sold land and gave a bond for title, and also stipulated to deliver possession of the land upon the payment of a portion of the purchase-money on a particular day; the purchaser failed to pay the money at the time specified, and the owner of the land subsequently sold it to a third person, and delivered possession to him; the latter sale was rescinded, and the owner filed a bill to compel a specific performance of the first contract: *Held*, that by the latter sale the vendor placed himself in a situation, in which he was not entitled to a decree for a specific performance against the first purchaser.
23. Hooker sold to Hester a tract of land and executed a title bond, in which he stipulated that he would surrender possession of the premises on the 1st day of September, 1838, upon the payment by Hester before that time of one of the notes given by him for the purchase-money, it being distinctly stated in the bond that the payment of the money should precede the delivery of possession; Hester failed to pay the money, and in October, 1838, Hooker sold the same land to Young, and delivered possession of the premises to him; the sale to Young was rescinded, and Hester subsequently filed a bill for a rescission of his contract with Hooker, and for a cancellation of his notes which were still outstanding; Hooker filed a cross-bill to compel a specific performance of the contract, alleging a readiness upon his part to comply with the terms of the contract: *Held*, that both the original bill and cross-bill should be dismissed, and the parties left to their legal remedies. *Ib.*
24. A marriage contract made in Tennessee by parties resident there at the time, and where the marriage also took place there, must be construed according to the laws of that state; it seems it would be otherwise if it were made with a view to its execution elsewhere. *Carroll v. Renich*, 798.

CORPORATION.

If an incorporation be appointed a trustee to execute trusts arising under a will, which are in themselves valid in point of law, neither the heirs of the testator, nor any other private person, can inquire into or contest the right of the corporation; that could only be done by the state which granted the charter. *Parker v. Am. Col. Society*, 663.

COSTS.

Where a rule for security for costs has been allowed in the court below, and the record does not show that any motion to dismiss was made below for want of security, or that the security required by the rule was not given, and the cause progressed to judgment after the rule was taken; *held*, that the high court would not disturb the judgment. *Bullard v. Dorsey*, 9.

COVENANTS.

1. Courts will construe covenants to be dependent, unless a contrary intention

clearly appears ; in an action, therefore, on a note given for land, to which the vendee received a bond for title to be made when the purchase-money was paid, and that was payable in instalments, the right to enforce payment is not distinct and independent from the inability to make title, and the defendant may set up and show in bar of the action on the notes a want of title in the vendor. *Peques v. Mosby*, 340.

2. The covenants raised by law from the use of particular words in the deed, are only intended to be operative when the parties themselves have omitted to insert covenants. Where the grantor does insert covenants, they constitute the extent of his liability. A deed therefore which contains the words *grant, bargain and sell*, (which words the statute gives a certain construction to,) but concludes with an express covenant of warranty, imposes no further liability on the grantor than is contained in his express covenant. *Weems v. McCaughan*, 422.
3. If a purchaser of real estate has protected himself by covenants, he is not entitled to be relieved from his contract if it be unmixed with fraud, until after eviction. *Walker v. Gilbert*, 456.
4. Where in one clause of a deed of marriage settlement between W. & H. the property was settled in trust for the use of W. & H. for their natural lives, and W. covenanted in the deed that the whole property and its proceeds should belong to H. for her sole and separate use ; *held*, that he was estopped by his covenants from setting up any claim to the property on the death of H. *Williams v. Claiborne*, 488.

CRIMINAL LAW.

1. A grand jury composed of all the regular venire in attendance on the court, being twelve in number, and two persons summoned by the sheriff, under the direction of the court, from the bystanders, is a good and legal grand jury. *Johnston v. The State*, 58.
- The case of *Thomas Dowling v. The State*, (5 S. & M. 664,) cited and affirmed.
2. In an indictment under the act of 1839, chap. 26, entitled " An act further to suppress and discourage gaming," it is not necessary to state the individual game of cards played ; the charge that the defendant " did play at a game at cards," is sufficiently definite for any reasonable or legal purpose. *Id.*
 3. On the trial of the defendant for suffering a gaming table to be exhibited in the house occupied by him, the court refused to instruct the jury " that if the accused had let the rooms of his house in which the exhibition of the faro-bank took place, to certain persons, and that at the time when he let them he had no knowledge or expectation that they would be used for that purpose, they must find for the defendant ;" *held*, that the instruction was properly refused, and that the tenants of the accused were equally subject to the statute. *Mount v. The State*, 277.
 4. The substitution of depositions for oral testimony belongs to civil trials ; in no state of circumstances under our constitution can a deposition of a

witness be used against the accused in a criminal prosecution, and a similar rule seems to hold as to depositions of witnesses in his favor, unless by his consent; therefore where a prisoner makes an affidavit for a continuance, the state cannot force him into a trial by admitting the truth of what the alleged absent witness would depose to.

Dominges v. The State, 475.

5. It seems that in criminal cases it should not be allowed or encouraged except in very extreme cases to admit what the prisoner in his application for a continuance stated that he expected to be proved by absent witnesses; but when such an admission has been once made, it constitutes an admission not merely that the absent witnesses would have sworn to certain alleged facts, but also that the facts alleged are absolutely true. *Ib.*

DAMAGES.

1. If the owner of land through which a company wishes to run a railroad, agree to refer to arbitrators the question of damages to be paid by the company for the right of way, and there be no express agreement that time shall be given for the payment of the damages awarded, the damages must be paid before the right of way can vest in the company.

Stewart v. Raymond Railroad Company, 568.

2. He who seeks to compel a specific performance of a contract must do all that is incumbent upon him or he cannot succeed; where therefore a railroad company agreed with the owner of land to refer to arbitrators the question of how much the company shall pay him for the right of way over his land, they cannot prevent him from the exercise of full ownership over the land, until they have paid or tendered to him the damages awarded.

Ib.

3. A purchaser of land, who at the time of purchase executed a deed of trust to secure the purchase-money, cannot convey to a company even an easement over the land, except subject to the payment of the purchase-money; when therefore such a purchaser did convey to a company an easement over the land, and the land was subsequently sold under the deed of trust, and the purchaser at the trust sale agreed with the company to refer to arbitrators the question of damages they should pay him for the enjoyment of the easement; it was held that the company were not entitled to an indefinite credit for the payment of the damages awarded, and to the enjoyment of the easement until the payment of the money, but they were bound to pay or tender the amount of damages before they could have any right to the enjoyment of the easement. *Ib.*
4. The doctrine in regard to the dedication of land to public uses has no sort of application to that class of cases arising out of the right of a railroad company to run their road through land without first paying the owner thereof the damages awarded to him for their so doing. *Ib.*
5. Where a railroad company neglect to pay the owner of the soil the dam-

ages awarded him for their right of way through his land, and he is exposed to the transit of the cars of the company over his land for an indefinite period, with but little prospect of compensation, a court of equity can grant him an injunction restraining the company from the use of his land.

R.

DANCING RABBIT CREEK TREATY—CLAIMS UNDER.

1. An Indian claiming under the 14th article of the treaty of Dancing Rabbit Creek, who has brought himself within the provisions of that article of the treaty, is clothed with a perfect legal title which will prevail against a patent subsequently issued by the general government to the reservation of such Indian. *Hit-tuk-ho-mi v. Watts*, 363.
2. A junior patent predicated on a reservation to a Choctaw Indian under the treaty of Dancing Rabbit Creek, is a superior title to a senior patent to the assignees of Jefferson College. *McAfee v. Keirn*, 780.

DEED.

1. A deed conveying all the vendor's lots in a certain town, is not uncertain, but is sufficient to convey all the vendor's interest derived by a deed from the commissioners who laid off the town. *Harmon v. James*, 111.
2. By the statute of the Mississippi territory which made all deeds not recorded within twelve months from their date of execution void as against a subsequent purchaser or mortgagee without notice; a subsequent purchaser or mortgagee from the same source or grantor is meant; as to all those claiming title from a different source, the unregistered deed would be as valid without recording as with it; where therefore a deed was made in 1806 from a person claiming under a Spanish grant, and the deed was not recorded until 1841, and in 1823 the United States government granted a patent to the land to a different party, the deed from the Spanish grantee would not be void as against such patentee. *Sessions v. Reynolds*, 130.
3. Under the statute of this state, which declares "that where the parties or witnesses to a deed reside in a foreign kingdom, state, nation or colony, the acknowledgment or proof made before any court of law, or mayor, &c. certified by the said court, mayor, &c. in the manner such acts are usually authenticated by them or him, shall be sufficient," an acknowledgment to a deed purporting to have been taken before the mayor of Liverpool, and to be his official certificate, and which bears the corporate seal, but which is not signed by that officer, but by the town clerk, is sufficient; the rule being that the certificate of the mayor of a foreign city is *prima facie* in due form or in the usual form of authenticating such acts; but it is not conclusive. *Ib.*
4. Where the validity of the certificate of a state officer is called in question, its conformity to law is a question of law for the court, being regulated by a public law of the state; but the conformity of the certificate of a foreign

- officer to the foreign law, is a question of fact, to be established by evidence. *Ib.*
5. Where a certificate of a foreign officer is made, the certificate is *prima facie* evidence of its conformity to law, and it devolves on him who questions its admissibility, to show that it is not in the usual form, to do which he must produce an authenticated copy of the foreign law, or if that cannot be had, the best evidence which the nature of the case admits of must be produced *Ib.*
 6. The covenants raised by law from the use of particular words in the deed are only intended to be operative when the parties themselves have omitted to insert covenants; where the grantor does not insert covenants they constitute the extent of his liability. A deed therefore, which contains the words "grant bargain and sell," (which words the statute gives a certain construction to) but concludes with an express covenant of warranty, imposes no further liability on the grantor than is contained in his express covenant. *Weems v. McCaughan*, 422.
 7. The recital in the premises of a deed is important, as its office is to explain the motives and reasons upon which the deed is founded.
Williams v. Claiborne, 488.
 8. The main object of a deed is to be gathered from its provisions; when that is ascertained it must prevail, and a proviso or condition repugnant to the grant if the grant be specific, is void, but if it be not specific the proviso or condition does not defeat it, and a proviso which is only explanatory is good. *Ib.*
 9. Where property was conveyed in trust and one declaration of trust was in conflict with and repugnant to the premises, recital, *habendum*, and every other declaration of trust, the former must yield and be rejected.
Ib.
 10. W. (in debt) and H. (possessed of large property) being about to marry by deed of settlement before the marriage, convey to a trustee for H.'s sole and separate use, all her property, and the interest, income and proceeds thereof on trust: 1. For the use of W. and H. for their natural lives, subject to disposal by H. by will. 2. That H. should have during her life, full control over the property, and that it should not be subject to W.'s debts or his control. 3. That the trustee might sell when requested: *Held*, that W. on the death of H. had no right in the property thus conveyed, or to a participation in the proceeds, income, or profits of it. *Ib.*
 11. A deed of trust made by P. to secure all judgments outstanding and unsatisfied against P. or the firm of B. & P. cannot be held to embrace a judgment against L. & P. *Lauderdale v. Hallock*, 622.
 12. Parol testimony to explain or vary the terms of written instruments, is received with great caution and distrust; yet such evidence is admissible to explain mistakes in a deed. *Ib.*
 13. P. executed a deed of trust to secure first, all judgments outstanding and

unsatisfied against P. himself or B. & P.; secondly, a note to C. executed by L. & P., and indorsed by S. P. L. and others; and after that to pay certain other specified debts. H. & B., who held an unsatisfied judgment against L. & P., filed a bill to recover from S. D. S. about \$1300 paid to him out of the trust fund on account of the note to C., alleging that by the terms of the deed of trust, they were preferred to S. D. L. or to C.; it was proved by the draftsman of the deed of trust, who was also one of the attorneys who recovered the judgment in favor of H. & B. that the judgment of H. & B. was not intended to be secured by the deed of trust; and if the words of the deed embraced that judgment it was a mistake of the draftsman of the deed: *Held*, that the judgment of H. & B. was not secured by the deed of trust, and their bill should be dismissed. *Id.*

14. Where a conveyance, intended as an indemnity to sureties and also as a security for the payment of the debt, describes the grantees as *indorsers*, when in fact they signed their names on the face of the note as *sureties*, the description will be considered as substantially correct. *Ross v. Wilson*, 753.
15. Parol proof, in equity, is admissible to show that a mistake occurred in drawing an instrument, though it is to be received with caution and distrust. *Id.*
16. By the law of Tennessee, where a slave is conveyed to one for life and on the termination of the life estate then to the heirs of the body of the tenant for life, and in default thereof, to the grantor and his heirs, the absolute right and title to the slave was vested in the tenant for life.

Carroll v. Renick, 798.

17. By a contract made in Tennessee in contemplation of marriage, certain slaves owned by the wife were conveyed to a trustee "for the use of the wife during her natural life and from the termination of that estate to the heirs of her body and their heirs forever, and in case she should die without such heirs, or having such heirs they should die before they arrive at mature age, then to her brothers by her mother's side and their heirs forever." The marriage took place, the wife died soon after giving birth to a son, who lived to be sixteen years of age and died, the husband having removed with the property to this state; it was *held*, on a bill by the brothers of the full blood of the wife, that the property by the deed of marriage settlement, vested absolutely in the wife, and on her marriage in the husband. *Id.*
18. Limitations in marriage agreements already *executed*, are subject to the same rules that limitations contained in other instruments are; it is only in cases of marriage articles, where the settlement is thereafter to be made and the trusts are *executory* that an exception to the general rule is permitted. *Id.*
19. By marriage agreements the marital rights are excluded only to the extent that a valid legal instrument operates to do so; where therefore a deed of settlement made in contemplation of marriage, made a limitation over of slaves to the intended wife for life, and after the life estate to the heirs of the tenant for life, and in default thereof to third parties, the limitation over being otherwise void; the fact that the slaves belonged to the wife at the time of the settlement and that the husband joined in the conveyance, will not render it

valid ; the limitation over being void and the husband by law being entitled to all the personal property of the wife at the time of the marriage, will be entitled also to such slaves. *Ib.*

20. How far in this state a limitation in a deed after a life estate to the heirs of the body of the tenant for life, and in default thereof, to third persons, is valid, and such third persons in default of such heirs will take,—*Quere?* It seems that the proviso to the section abolishing entails, which says “provided that any person may make a conveyance or devise of lands to a succession of donees then living, and the heir or heirs of the body of the remainder-men, and in default thereof to the right heirs of the donor in fee simple.” (H. & H. § 24, p. 348) and also the statutes in regard to contingent limitations and executory devises, (H. & H. 349, § 26,) alter the common law on the subject of such limitations. *Ib.*

DELIVERY.

1. As between donor and donee the gift of a chattel is incomplete without delivery, or some act equivalent to delivery, if at the time the things given be susceptible of transmission ; actual delivery is not necessary ; it may be constructive or symbolical. *Carradine v. Collins*, 428.
2. It seems that the delivery of a deed, or having it recorded, the declarations of the donor, the situation of the parties, are circumstances which the jury may take into consideration, on the question as to whether there was a delivery from the donor to the donee ; but without the jury are satisfied that there was a delivery, they cannot find that it was a gift. *Ib.*

DEMURRER.

1. Where a demurrer was filed to a plea, and the record did not state in so many words that the demurrer was sustained ; but it appeared in the record that the defendant, under a judgment of *respondent ouster* plead again ; *held*, that the record showed sufficiently that the demurrer had been sustained. *Smith v. Elder*, 507.
2. Where pleas were filed on which issues were taken, and another plea to which a demurrer was sustained, and on a judgment of *respondent ouster* the defendant plead a similar plea, to which a like demurrer was filed, of which last demurrer the record showed no disposition, but the parties went on to trial on the issues made up ; *held*, that under the circumstances, this court would presume that the parties waived the last demurrer. *Ib.*

DEPOSITION.

It is competent for counsel to agree that a commission to take a deposition may issue at any time, and to provide that notice of the time and place of taking the deposition shall be given to their clients. Where, therefore, it was agreed between the counsel of both parties that a commission should issue forthwith, without affidavit, to take a deposition, and that one day's

notice of the time and place of taking the deposition should be given T. R. L. & Co., and the notice was given to H. R. L. & Co., and a member of that firm attended the taking the deposition ; *held*, that the notice not being in accordance with the agreement, the deposition might be properly ruled out. *Bohr v. Steamboat Baton Rouge*, 715.

DEPUTY.

By law the clerk of the circuit court may appoint deputies, but the deputy is responsible to the clerk alone, and the clerk is liable to parties who may be injured by the acts of the deputy, as the acts of the deputy are the acts of the principal. *McNutt v. Livingston*, 641.

DISCONTINUANCE.

It is a good plea in abatement of an action *ex contractu*, that too many persons are joined as defendants ; as where three persons are sued as members of a firm, and the plea in abatement sets up that the firm was composed of but two. And if a demurrer to such plea be sustained improperly, the error will not be cured by a subsequent discontinuance of the suit as to the party improperly joined ; it seems it would be otherwise if the discontinuance had taken place before the decision of the demurrer. *Gasquet v. Fisher*, 313.

DISTRIBUTION.

1. Any one of several distributees of an estate may, at the expiration of the time restricted by the statute, apply by petition to the probate court for his distributive share, without joining his co-distributees ; and the probate court will compel the distribution on the petitioner's entering into the bond with the surety required. *Benoit v. Brill*, 32.
2. Where a free man of color applied by petition in the probate court to have distribution of his father's estate, alleging in the petition that he was the natural son of his father, and that the legislature of the state had granted him all the right, title, and interest which it had by the law of escheat in his father's estate ; and had by act confirmed his manumission ; and the administrator answered, denying the freedom of the petitioner, asserting that he was the property of the estate, and that there were other persons claiming to be heirs of the deceased, but offered no proof of the slavery of the petitioner ; *held*, that the petitioner made out a *prima facie* case of a right to distribution, and that the petition should be allowed by the probate court, unless the administrator should require an issue to the circuit court to ascertain the alleged freedom of the petitioner. *Ib.*
3. After distribution of the estate of a deceased person under an order of the probate court, the superior court of chancery has not jurisdiction of a bill by a person alleging himself to be a distributee whose claims had been overlooked or disregarded in the distribution in the probate court, against one of the other distributees, to recover from him a ratable proportion of the estate. The remedy was in the probate court. *Gaines v. Smiley*, 53.

4. J. W., with G. as his security, executed a note to the executrix of M. W. J. W. died, and F. G. W., his administrator, who was one of the distributees of the estate of M. W., directed the executrix to retain the note out of his distributive share, which was not done; the executrix sued G., the surety of J. W., on the note, and G. plead payment: *Held*, that the debt being due from J. W., and the distributive share being due to his administrator, there was an absence of that mutuality which is essential to the right of set-off; that the executrix could not compel compliance with the direction of F. G. W., and it did not therefore amount to a payment of the note. *Wadlington v. Gary*, 522.

DOWER.

1. Where the grantor in a deed is sued for a breach of his covenant of warranty, and the alleged breach consists of the recovery of dower in the land conveyed, by an order of the probate court, it is clearly competent for the grantor to show that the land embraced in his deed was not subject to the dower allotted out of it, and to preclude him from such defence is error. *Enos v. Smith*, 85.
2. The interest allowed by law to the widow in the personalty of her deceased husband, is considered by our statutes as dower therein, and must be proceeded for in the probate court in the mode pointed out by the statute H. & H. 421, § 123. *Caillaret v. Bernard*, 316.
3. A petition, therefore, for dower in personalty, that does not set forth in what the personalty consisted, nor that the deceased died in the county where the petition was filed, nor what the property in which the interest was claimed, is defective and liable to demurrer; in such case, however, leave to amend the petition should be granted by the court. *Id.*
4. It is a principle of evidence, that when two writings refer to each other with a view to the construction of either, being cotemporaneous and kindred in respect to subject-matter, they are deemed one instrument when the controversy is between the original parties and their representatives. Where, therefore, a deed conveying the absolute fee in real estate was executed, and at the same time the grantee executed a paper reciting that he received the property charged with the settlement of the just debts of the grantor; *held*, that the latter paper was correctly admitted in evidence in an action of ejectment by the grantee in the deed, on the part of the defendant, to show that the grantee had but a trust in the property, and that therefore the widow of the grantor, who had intermarried with him since the deed, was entitled to dower in the property. *Caillaret v. Bernard et ux.* 319.
5. Where a grantor in a deed, which conveyed the fee simple in land to the grantee, took from the grantee an acknowledgment that he held the land subject to the just debts of the grantor, and charged with their settlement, and the grantor subsequently marries and dies, his widow will be entitled to dower in such realty; and if the property thus conveyed be the mansion-

house of her husband, in which he was residing at the time of his death, she may, even though her dower has not been formally allotted to her, set up her possession as widow and dowress of the mansion-house in bar of an action of ejectment by such grantee; and even though it appears in proof on the trial, that the premises are held in possession by a tenant of the widow, yet if it do not appear that she has given a lease or actual transfer of her privilege of possession, and she be let in to defend in the action, it is competent for her to rely on her right of possession under the statute H. & H. 353, § 47. *Ib.*

EJECTMENT.

It is no ground of objection to a verdict and judgment in ejectment, that the record does not show a plea of not guilty, where the parties appeared and tried the cause upon its merits. *Cailaret v. Bernard et ux.* 319.

EQUITABLE ASSETS.

1. The interest of the vendor in land who has given a bond for title on payment of the purchase-money, and who has received a portion thereof from the vendee, is not subject to seizure and sale under execution at law at the suit of a judgment-creditor, who has obtained his judgment since the date of the title bond and the payment of such portion of the purchase-money.

Money v. Dorsey, 15.

2. M. bought a piece of land from P. and paid part of the price in cash, and received a bond for title on payment of the residue; P. afterwards sold the same land to C., who resold it to M.; subsequent to the sale by P. to M., but before the sale by P. to C., a judgment was recovered by D. against P., and execution thereon levied on the same land; held, that M. was entitled to an injunction against the sale; that P. had not an interest capable of sale under execution; and was a mere trustee of the title for M., whose interest was not affected by the sale to C., though it might have been otherwise if C. had set up that he was a *bona fide* purchaser for a valuable consideration, without notice of the previous sale to M. *Ib.*

3. The interest of a party in land, who holds only a bond for title when the purchase-money is paid, and who has paid only a part of the purchase-money, is not subject to sale under an execution at law.

Delafield v. Anderson, 630.

4. The interest of a party holding only a bond for title to land, the whole of the purchase-money not being paid, is not subject to a sale under an execution at law. *Ellis v. Ward*, 651.

ERROR.

1. The judgments of inferior courts are presumed to be correct, unless the contrary be shown; but when error has intervened which may have operated prejudicially, the injured party is entitled to a reversal, unless it appear of record affirmatively that the error was waived. *Ross v. Mims*, 121.

2. It is a general rule, that any one who seeks to reverse a judgment, must put his finger on the error, as every presumption is in favor of the correctness of judgments. *Green v. Creighton*, 197.

ESTATES OF DECEDENTS.

1. Any one of several distributees of an estate may, at the expiration of the time restricted by the statute, apply by petition to the probate court for his distributive share, without joining his co-distributees; and the probate court will compel the distribution, on the petitioners entering into the bond with the surety required. *Benoit v. Brill*, 32.
2. Where claims against the estate of a decedent were referred by the probate court to referees, who made a report which was received and confirmed; and the parties, by an agreement, entered of record in the probate court, agreed that the former order, appointing referees, and also their report to set aside, and the claims in controversy referred to other referees; and the last named referees reported in favor of the claims, and their report was approved and confirmed by the court; it was held that if any objection existed to the original appointment of referees, the party waived it by agreeing to set aside their appointment and report, and to the appointment of other referees. *Regan v. Stone*, 104.
3. A report of referees to whom a claim against an insolvent estate was referred, which shows that the amount of the penalty of an administrator's bond was allowed as a valid claim against the estate, without any proof of a breach of the conditions of the bond, or of damages actually sustained by the parties interested, is erroneous on its face, and may be set aside by the probate court, on exceptions being taken to it. *Green v. Creighton*, 197.
4. Under the statute of this state, which provides that when a person dies insolvent, his estate, "both real and personal, shall be distributed to and among all the creditors, in proportion to the sums to them respectively due and owing;" taken in connection with the statute that makes "all promises, contracts and liabilities of copartners joint and several," the debts due by a deceased person individually and as a partner, will stand on exactly the same footing and be entitled to equal satisfaction out of the insolvent's estate. Mr. C. J. SHARKEY dissenting. *Dahlgren v. Duncan*, 280.
5. In such case, if the creditor of the partnership have sued the surviving partners, and procured payment of any portion of the debt, the estate of the deceased will be entitled to the benefit of it; if the creditor looks only to the estate of the deceased, and that pays more than its proportion, the representatives of the estate will stand in the place of the creditor and substituted to his rights with reference to the other partners. *Ib.*
6. The probate court has no jurisdiction of a bill filed by the assignee of an open account against the assignor, and the administrator of the administratrix of the debtor, in the open account, to compel the administrator to pay the account to the assignee, on the ground that the administratrix in her lifetime had promised the payment of it to the assignee, provided the account

- should be allowed to her in the settlement of her intestate's estate, and that it had been so allowed ; but the administratrix had not paid it, and the assignor claimed it as being due to him. *McCoy v. Rhodes*, 296.
7. A literal compliance with the statute pointing out the mode by which an administrator may sell the realty of his intestate, is necessary in order to enable the court to render a valid judgment for the sale of the land ; and if the statute has not been strictly complied with, the order of sale and the sale are void ; and the records of the probate court must show affirmatively that the statute has been in all respects complied with. *Planters Bank v. Johnson*, 449.
8. Where the realty of an intestate who has but a bond for title when the purchase-money is paid, and who has paid but a part thereof, is sold by an administrator, without giving the requisite notice, and the purchaser has executed his note, payable to the person to whom the residue of the purchase-money is due, in payment for the price bid at the sale, he may notwithstanding avoid the note, as the sale was absolutely void, and did not divest the intestate's right. *Ib.*
9. In the case of the sale of the real estate of a deceased person, the record of the probate court must show that all the proceedings were regular, and that the citations were published according to law ; such degree of strictness is not, however, necessary in the sale of chattels which go to the administrator to be administered ; in such case, even though the record do not show that citations were published according to law, the sale will be valid, and that though it be a lease for ninety-nine years which is sold. *Dillingham v. Jenkins*, 479.
10. The creditors of an estate have the first claim upon the property in the hands of the administrator, and it is his paramount duty to protect their interest, by using every effort to make the property under his charge sell for the best price that can be had for it. *Pearson v. Moreland*, 609.
11. An administrator cannot purchase at his own sale, either directly or indirectly ; nor can he sell under a secret trust or private understanding, that he is to have an interest in the property, or derive a benefit from the sale ; nor can he dispose of it for the benefit of his private friends. *Ib.*
12. The property of an estate, in the hands of an administrator, is devoted by law to particular purposes, and it is a breach of trust in him to permit counteracting interests to divert it from its legitimate destination, or to diminish its value. *Ib.*
13. M. and his wife, as administrators of W. sold a large amount of property, which was purchased by S. who was the sister of M.'s wife, and a member of his family ; several creditors of the estate objected to the probate court confirming the administrator's report of the sale, on the ground of fraud, and the administrators insisted on a confirmation of the report ; it was proved that the property sold for less than one-third of its appraised value, and of what the witnesses proved it was really worth ; that there were only four persons present when the sale commenced ; that it was proclaimed on the

ground that persons were coming to the sale who wished to buy property that was to be sold, and were expected to arrive very soon, and did get there immediately after the sale was over; that the administrator upon hearing that such persons were coming, instructed the auctioneer to proceed forthwith with the sale; that only one person beside S. bid at the sale, and he only on one lot of negroes; that his bid seemed to produce great surprise, and he was immediately taken aside and informed that the claim of his brother, for whom he was acting, should be secured in full, if he would agree to bid no more, to which he assented, and the note of S. with security was given for the amount of his brother's debt; that the claim of another who resisted the sale was also compromised, and the note of S. with security given for it; that a witness who attended the sale with the intent of bidding, before the sale commenced asked M. if the family wished to buy the property, and was told that S. expected to purchase it; that S. was crying during the sale, and appeared very much affected when the bid was made in opposition to her; that in a conversation, before the sale, with one who expected to buy the property, M. said he did not think any person would bid for the property against the children or against him, and he wished and expected to buy it very low; and that the administrators reported to the probate court, when they applied to have the estate declared insolvent, that the debts against the estate amounted to \$14,504, and the assets to \$9110: *Held*, that the testimony showed beyond a reasonable doubt that M. and his wife were not acting in good faith towards the creditors, and that they had concocted a plan by which the property should be sold for a trifle, and bought in for their benefit, and that sales so made are fraudulent in fact and in law; and it is the duty of the probate court to set them aside, and order the property to be resold. *Ib.*

14. The probate court may refuse to confirm an administrator's report of a sale fraudulently made, set aside the sale, and order the property to be resold, without notice to the purchaser, at such fraudulent sale. *Ib.*

ESTOPPEL.

Where, in one clause of a deed of marriage settlement between W. & H. the property was settled in trust for the use of W. & H. for their natural lives, and W. covenanted in the deed that the whole property and its proceeds should belong to H. for her sole and separate use: *Held*, that he was estopped by his covenants from setting up any claim to the property on the death of H. *Williams v. Claiborne*, 488.

EVIDENCE.

1. If the answer of a defendant to a bill in chancery be made a cross-bill, the answers of the complainant to the interrogatories propounded in the cross-bill are good evidence in favor of the complainant.

Money v. Dorsey, 15.

2. The authority of an attorney upon a general retainer to collect money, extends no further than to receive the amount in legal currency; if he accept anything else without special authority, the client may refuse to acknowledge it as a payment, and may reissue the execution; where, therefore, an attorney at law received of his client's judgment debtor the notes of third persons and receipted for them as cash to the debtor, the creditor, it was held, might still proceed with the execution against the debtor, unless the debtor could show that the attorney was authorized to make the arrangement; and the attorney's statements at the time that he was so authorized, will not be evidence of such authority; especially where the attorney in his deposition states that he has no recollection of having had a special authority. *Garvin v. Lowry*, 24.
3. Where the answer to a bill of discovery is used, it is evidence for or against the party using it; but the bill of discovery may be dismissed, and other evidence resorted to. *Carson v. Flowers*, 99.
4. If the party who prays for a discovery does not use the answer, it is not his evidence, and he cannot be concluded by it; and he may introduce other evidence to establish the fact in reference to which a discovery was sought. *Ib.*
5. The copy of a title bond, taken from the record thereof, duly certified, is not evidence without accounting for the absence of the original.
Harman v. James, 111.
6. In an action of ejectment by the vendee of one tenant in common against those claiming under his co-tenant, it is incompetent to prove by parol the declaration of the plaintiff's vendor, that he had, many years previous, conveyed all his interest, in the land in controversy, to his co-tenant, under whom the defendant claimed. If such conveyance were lost, it could be set up by bill in equity. *Ib.*
7. Where, on an application to the probate court to remove an executor for maladministration, oral testimony was given, but not taken down at the time, the executor having time given him until the next term to reduce it to writing; and after the decision of the court, removing the executor, he had the witnesses reexamined before a justice of the peace, and their testimony taken down, and the clerk of the probate court certifies to the correctness of the transcript of the evidence: *Held*, that the high court of errors and appeals could not notice the testimony; it was irregular to reexamine the witnesses after the trial; the evidence under the statute should have been taken down and recorded at the time. *Ross v. Mims*, 121.
8. Under the statute of this state, (How. & Hutch. 605, § 24,) which makes duly authenticated copies of the records, appertaining and belonging to the land offices of the United States, established in this state, evidence where the originals would be, the duly authenticated copy of a certificate of confirmation by the board of commissioners, west of Pearl River, of a Spanish grant of land, taken from the records in the land office at Washington, in this state, is competent testimony, without accounting for the original.

Sessions v. Reynolds, 130.

9. A deed which purports to remise, release, and quit-claim title to land, is competent testimony on behalf of the releasee therein, forever; though the words be not sufficient to pass an entire estate in land, yet they are sufficient to perfect a title in one having claim of title, and therefore as a link in the chain of title, depending for its effect upon its connection with other instruments or evidence, and as a constituent part of title, such deed is competent testimony. *Ib.*
10. Under the statute of this state which declares "that where the parties or witnesses to a deed reside in a foreign kingdom, state, nation or colony, the acknowledgment or proof made before any court of law or mayor, &c. certified by the said court, mayor, &c., in the manner such acts are usually authenticated by them or him, shall be sufficient," an acknowledgment to a deed purporting to have been taken before the mayor of Liverpool, and to be his official certificate, and which bears the corporate seal, but which is not signed by that officer, but by the town clerk, is sufficient; the rule being that the certificate of the mayor of a foreign city is *prima facie* in due form or in the usual form of authenticating such acts; but it is not conclusive. *Ib.*
11. Where the validity of the certificate of a state officer is called in question, its conformity to law is a question of law for the court, being regulated by a public law of the state; but the conformity of the certificate of a foreign officer to the foreign law is a question of fact to be established by evidence. *Ib.*
12. Where a certificate of a foreign officer is made, the certificate is *prima facie* evidence of its conformity to law, and it devolves on him who questions its admissibility, to show that it is not in the usual form, to do which he must produce an authenticated copy of the foreign law, or if that cannot be had, the best evidence which the nature of the case admits of must be produced. *Ib.*
13. Where the court below rejects proof of a particular fact, which fact can only be established in a particular way, the record must show that the proof rejected was pertinent to the establishment of that particular fact in that way; where, therefore, the bill of exceptions recited that the defendant "offered to prove" that the acknowledgment of a foreign officer was not in due form, without showing how or by what proof, and the court below rejected the proof, it was *held*, that the record did not show that the court below had erred, and the presumption of law was in favor of its correctness. *Ib.*
14. The duly authenticated copy of a plat and survey of lands contained in a confirmation of a Spanish grant from the office of the surveyor-general of lands south of Tennessee, is evidence under the statute; nor will the fact that in the certificate of authentication the surveyor-general puts no date, make any difference, if he certifies as surveyor-general, and the presumption is, the certificate is true, until the contrary is shown; nor will the fact that the copy of such survey, from the surveyor-general's office, differs materi-

- ally from the map of the same land in the register's office, exclude the former from testimony; both copies are testimony under the statute, and of equally high grade; the mistakes in the maps can only be corrected by actual surveys. *Ib.*
15. The recital in the bill of exceptions, that counsel relied, in the probate court, on the hearing of exceptions taken to the report of referees to whom a claim against an insolvent estate, founded on an administrator's bond, had been referred upon a decree of said court, fixing the amount of the administrator's liability on the bond as evidence in support of the report of the referees, will not justify the high court of errors and appeals in deciding that there was such a decree, or that it was sufficient evidence to support the report, when no such decree appears in the record. *Green v. Creighton*, 197.
16. Where A. draws a bill on B. in favor of C., and B. accepts the bill in writing and is sued upon it, he cannot show by parol evidence that the acceptance of the bill of exchange was given to C. to be obligatory upon condition that A. finished a job of work that he had undertaken for B. The acceptance is an absolute contract to pay, and it cannot therefore be shown by parol that it was not absolute. *Heaverin v. Donnell*, 244.
17. Where a bill of exchange was described in the declaration, as dated on the 7th day of December, A. D. 1840, at Natchez, drawn by Patrick Burke on, and accepted by Robert C. Heaverin, in favor of John O. Donnell, for the sum of ninety dollars, and a deposition spoke of a bill drawn by Patrick Burke, in favor of John O. Donnell, on the said Robert C. Heaverin, in the fall or winter of 1840, for ninety dollars, but did not give the precise date: *Held*, that the deposition did not sufficiently identify the bill sued upon, with the one respecting which the witness testified. *Ib.*
18. The return of a sheriff, made upon process in discharge of duty, required by law, which shows a reason or excuse for an omission to perform the duty required by the court, is not conclusive evidence in favor of the officer; on a motion against the officer, predicated on such omission, his return may be impeached. *Duckworth v. Millsaps*, 308.
19. It is a principle of evidence, that when two writings refer to each other with a view to the construction of either, being contemporaneous and kindred in respect to subject-matter, they are deemed one instrument when the controversy is between the original parties and their representatives; where, therefore, a deed conveying the absolute fee in real estate was executed, and at the same time the grantee executed a paper reciting that he received the property charged with the settlement of the just debts of the grantor: *Held*, that the latter paper was correctly admitted in evidence in an action of ejectment by the grantor, in the deed, on the part of the defendant, to show that the grantee had but a trust in the property, and that therefore the widow of the grantor who had intermarried with him since the deed, was entitled to dower in the property. *Caillaret v. Bernard et al.* 319.
20. Where the record does not purport to set out all the testimony, this court will presume that all written evidence spread out in the record, was properly

proved in the court below, to render it competent testimony. *Caillaret v. Bernard et ux.* 319.

21. In an action on a note given for land, in which the defendant under the plea of *non assumpsit*, offered proof to show that the plaintiff had not title to the land for which the notes were given, it is not competent for the plaintiff to show by parol that there was a mistake in the description of the land in the title bond; and that the defendant was really put into possession of the land sold, and had enjoyed it ever since; such proof may be made in a court of equity, but not of law. *Peques v. Mosby*, 340.
22. Where the assignees of a turnpike road company sue for tolls for passing over their road, it is not necessary to make perfect in the declaration of the grant of franchise, the transfer and the authority to exact toll, they are all matters of evidence. *Dulaney v. Starke*, 375.
23. The recital in the records of the probate court, on an application for sale of a deceased person's realty, that "it appearing to the satisfaction of the court that publication has been made in pursuance of the order," &c. even if evidence that publication had been made, would not be evidence that citation had been posted up at three public places, and the statute requires both modes of notice. *Planters Bank v. Johnson*, 449.
24. The substitution of depositions for oral testimony belongs to civil trials; in no state of circumstances under our constitution can a deposition of a witness be used against the accused in a criminal prosecution; and a similar rule seems to hold as to depositions of witnesses in his favor, unless by his consent; therefore where a prisoner makes an affidavit for a continuance, the state cannot force him into a trial by admitting the truth of what the alleged absent witness would depose to. *Dominges v. The State*, 475.
25. It seems that in criminal cases it should not be allowed or encouraged, except in very extreme cases, to admit what the prisoner in his application for a continuance stated that he expected to be proved by absent witnesses; but when such an admission has been once made, it constitutes an admission not merely that the absent witnesses would have sworn to certain alleged facts, but also that the facts alleged are absolutely true. *Ib.*
26. Where a suit was brought in the name of one for the use of another, the nominal plaintiff, where the testimony is against himself, is a competent witness, though objected to by the usee, if he do not himself object to testify. *Smith v. Elder*, 507.
27. Where a note was payable "in the notes of the chartered banks of Mississippi *at par*," it is not competent to explain by parol the kind of funds in which the note was payable, as there was no latent ambiguity in the note; the note meaning that the notes of chartered banks were to be taken as at par, that is, without discount or premium. *Ib.*
28. Where one surety on a note pays it, and files a bill against a co-surety for contribution, the defendant may prove by parol evidence the engagement

actually undertaken by him when he signed the note. *Hunt v. Chambliss*, 532.

29. Parol testimony to explain or vary the terms of written instruments is received with great caution and distrust; yet such evidence is admissible to explain mistakes in a deed. *Lauderdale v. Hallock*, 622.

30. Parol proof in equity, is admissible to show that a mistake occurred in drawing an instrument, though it is to be received with caution and distrust. *Ross v. Wilson*, 753.

EXECUTION.

1. The interest of the vendor in land who has given a bond for title, on payment of the purchase-money, and who has received a portion thereof from the vendee, is not subject to seizure and sale under execution at law, at the suit of a judgment-creditor, who has obtained his judgment since the date of the title bond and the payment of such portion of the purchase-money. *Money v. Dorsey*, 15.

2. M. bought a piece of land from P. and paid part of the price in cash, and received a bond for title on payment of the residue; P. afterwards sold the same land to C., who resold it to M.; subsequent to the sale by P. to M., but before the sale by P. to C., a judgment was recovered by D. against P., and execution thereon levied on the same land: *held*, that M. was entitled to an injunction against the sale; that P. had not an interest capable of sale under execution; and was a mere trustee of the title for M., whose interest was not affected by the sale to C.; though it might have been otherwise if C. had set up that he was a *bona fide* purchaser, for a valuable consideration, without notice of the previous sale to M. *Ib.*

3. Where a bond ~~for~~ title is given, the interest of the vendee is not the subject of execution sale at law, unless the purchase-money has all been paid; and where a party to a suit in ejectment claims title through a purchase at sheriff's sale of the interest of such vendee, it seems it is incumbent on him to show that the purchase-money has all been paid by such vendee, at the time of the execution sale. *Harmon v. James*, 111.

4. It is fully settled that no payment of an execution in anything short of lawful money, to wit, coin of the United States, will amount to a satisfaction, unless it be with the consent of the plaintiff in the execution.

Anketell v. Torrey, 467.

5. The consent of a plaintiff, in an execution, to receive bank notes in satisfaction thereof, may be express or implied, and all facts and circumstances tending to show such consent, may legitimately be allowed to go to a jury. *Ib.*

6. A. made a motion against a sheriff and his sureties for failing to pay over money collected on an execution; and the sheriff was permitted to prove that he collected the amount of the execution in the notes of the Mississippi Union Bank, and notified the attorney of A. of that fact, and the attorney expressed no dissatisfaction respecting the character of funds collected;

- that about the same period A. was in the habit of receiving from his agents and attorneys at law, without objections, the same kind of funds; that Union money constituted the circulating medium of the country at that time, and it was uniformly received by clients; that the money was collected at the December term, 1839, and the motion was not made until the November term, 1843, all of which evidence was objected to by A. but was permitted by the court to go to the jury, as tending to show the consent or acquiescence of A. to the receipt of the Union money, in satisfaction of his execution; *Held*, that the evidence was legitimate, and was properly permitted to go to the jury. *Ib.*
7. Upon a motion against a sheriff and his sureties for failing to pay over money collected upon an execution, where it was proved that the amount of the execution was collected in the notes of the Mississippi Union Bank, with the consent of the attorney of the plaintiff; that Union money at that time constituted the general circulating medium of the country, and was uniformly received by clients; that the plaintiff about the same time was in the habit of receiving from his agents and attorneys at law, without objection, large sums in the same kind of funds; that the money was collected at the December term of the court, in 1839, and the motion was not made till the November term, 1843; the court could not properly instruct the jury that there was no legal evidence that the plaintiff authorized the sheriff to receive the Union bank notes. *Ib.*
 8. Whether the road of a railroad company is subject to sale under an execution at law, *quære?* *Stewart v. Raymond Railroad Company*, 568.
 9. The interest of a party holding only a bond for title to land, the whole of the purchase-money not being paid, is not subject to a sale under an execution at law. *Ellis v. Ward*, 651.

EXECUTORS AND ADMINISTRATORS.

1. Where, in an action against an administrator, as such, the judgment is rendered *de bonis propriis*, this court will reverse the judgment, but will render such judgment as the court below ought to have rendered.
Barrow v. Wade, 49.
2. Where, on an application to the probate court to remove an executor for maladministration, oral testimony was given, but not taken down at the time, the executor having time given him until the next term to reduce it to writing; and after the decision of the court removing the executor, he had the witnesses re-examined before a justice of the peace and their testimony taken down, and the clerk of the probate court certifies to the correctness of the transcript of the evidence; *held*, that the high court of errors and appeals could not notice the testimony; it was irregular to re-examine the witnesses after the trial; the evidence under the statute should have been taken down and recorded at the time. *Ross v. Mims*, 121.
3. Where an application is made to the probate court to remove an executor for insufficient security on his bond, the sureties may prove their sufficiency

- by their own oath, like the qualifying of bail; which being done, it then devolves on the other party to show their insufficiency by other evidence. *Ib.*
4. In an action at law on an administrator's bond, the bond is but inducement to the action, and no recovery can be had on it without proof of damages. *Green v. Creighton*, 197.
5. An administrator's bond, without proof of damages, is not a valid claim against an insolvent estate, or against any one. *Ib.*
6. A report of referees to whom a claim against an insolvent estate was referred, which shows that the amount of the penalty of an administrator's bond was allowed as a valid claim against the estate, without any proof of a breach of the conditions of the bond, or of damages actually sustained by the parties interested, is erroneous on its face, and may be set aside by the probate court, on exceptions being taken to it. *Ib.*
7. The recital in the bill of exceptions, that counsel relied, in the probate court, on the hearing of exceptions taken to the report of referees to whom a claim against an insolvent estate, founded on an administrator's bond, had been referred upon a decree of said court, fixing the amount of the administrator's liability on the bond as evidence in support of the report of the referees, will not justify the high court of errors and appeals in deciding that there was such a decree, or that it was sufficient evidence to support the report, when no such decree appears in the record. *Ib.*
8. The probate court has no jurisdiction of a bill filed by the assignee of an open account against the assignor and the administrator of the administratrix of the debtor in the open account, to compel the administrator to pay the account to the assignee, on the ground that the administratrix in her lifetime had promised the payment of it to the assignee, provided the account should be allowed to her in the settlement of her intestate's estate, and that it had been so allowed; but the administratrix had not paid it; and the assignor claimed it as being due to him. *McCoy v. Rhodes*, 296.
9. The statute makes it the duty of executors and administrators to cause publication to be made for the presentation of claims against the estates which they represent, to be commenced within two months after the granting of letters testamentary, &c.; the same statute also provides that all claims against the estates of decedents shall be presented to the executor, &c. within eighteen months after the publication of notice, for that purpose, by such executor, &c. The notice thus designed to be given is purely constructive, and the provisions of the law must be strictly pursued by executors, &c.; in order therefore to bar the claims of creditors of an estate because they had not been presented within eighteen months from the publication of the grant of letters, the executor or administrator must show affirmatively, that the publication was commenced within two months after the granting of letters testamentary, &c. *Pearl v. Conley*, 356.
10. The creditors of an estate are not bound to take notice of any publication made by executors and administrators, requiring the presentation of claims within eighteen months, &c. commenced after the expiration of two months from the date of the grant of letters. *Ib.*

11. A literal compliance with the statute, pointing out the mode by which an administrator may sell the realty of his intestate, is necessary in order to enable the court to render a valid judgment for the sale of the land ; and if the statute has not been strictly complied with, the order of sale and the sale are void ; and the records of the probate court must show affirmatively that the statute has been in all respects complied with.

Planters Bank v. Johnson, 449.

12. The recital in the records of the probate court, on an application for sale of a deceased person's realty, that "it appearing to the satisfaction of the court that publication has been made in pursuance of the order," &c., even if evidence that publication had been made, would not be evidence that citation had been posted up at three public places ; and the statute requires both modes of notice. *Ib.*

13. Where the realty of an intestate, who has but a bond for title when the purchase-money is paid, and who has paid but a part thereof, is sold by an administrator without giving the requisite notice, and the purchaser has executed his note, payable to the person to whom the residue of the purchase-money is due, in payment for the price bid at the sale, he may notwithstanding avoid the note, as the sale was absolutely void, and did not divest the intestate's right. *Ib.*

14. In the case of the sale of the real estate of a deceased person, the record of the probate court must show that all the proceedings were regular, and that the citations were published according to law ; such degree of strictness is not however necessary in the sale of chattels, which go to the administrator to be administered ; in such case even though the record do not show that citations were published according to law, the sale will be valid ; and that though it be a lease for ninety-nine years which is sold.

Dillingham v. Jenkins, 479.

15. A lease for ninety-nine years is of no higher degree than a lease for one year ; both are mere chattels, and go to the administrator to be administered. *Ib.*

16. The transfer of a note, due to an estate, by the administrator in payment of his own debt, gives the assignee with notice no right of recovery.

Scott v. Searles, 498.

17. If a note given to an administrator for the purchase of personal estate of the decedent, be transferred by the administrator in payment of his own debt, a subsequent administrator, the first having resigned his office, may file a bill in equity to enjoin the collection of the note by the assignee ; and the chancery court, having entertained jurisdiction, to aid in the execution of the trust imposed on the administrator, and to prevent the multiplicity of suits, may grant relief, and direct the note to be given up to the acting administrator. *Ib.*

18. The creditors of an estate, have the first claim to the property in the hands of the administrator, and it is his paramount duty to protect their interest by using every effort to make the property under his charge sell for the best price that can be had for it. *Pearson v. Moreland*, 609.

19. An administrator cannot purchase at his own sale, either directly or indirectly, nor can he sell under a secret trust or private understanding, that he is to have an interest in the property; or derive a benefit from the sale; nor can he dispose of it for the benefit of his private friends. *Ib.*
20. The property of an estate in the hands of an administrator, is devoted by law to particular purposes; and it is a breach of trust in him to permit counteracting interests to divert it from its legitimate destination, or to diminish its value. *Ib.*
21. M. and his wife, as administrators of W., sold a large amount of property, which was purchased by S., who was the sister of M.'s wife, and a member of his family; several creditors of the estate objected to the probate court confirming the administrator's report of the sale, on the ground of fraud, and the administrators insisted on a confirmation of the report; it was proved that the property sold for less than one-third of its appraised value, and of what the witnesses proved it was really worth; that there were only four persons present when the sale commenced; that it was proclaimed on the ground that persons were coming to the sale, who wished to buy property that was to be sold, and were expected to arrive very soon, and did get there immediately after the sale was over; that the administrator, upon hearing that such persons were coming, instructed the auctioneer to proceed forthwith with the sale; that only one person besides S. bid at the sale, and he only on one lot of negroes; that his bid seemed to produce great surprise, and he was immediately taken aside and informed that the claim of his brother, for whom he was acting, should be secured in full, if he would agree to bid no more, to which he assented, and the note of S. with security was given for the amount of his brother's debt; that the claim of another who resisted the sale was also compromised, and the note of S., with security given for it; that a witness who attended the sale, with the intent of bidding, before the sale commenced, asked M. if the family wished to buy the property, and was told that S. expected to purchase it; that S. was crying during the sale, and appeared very much affected when the bid was made in opposition to her; that in a conversation before the sale with one who expected to buy the property for M., M. said he did not think any person would bid for the property against the children or against him, and he wished and expected to buy it very low; and that the administrators reported to the probate court, when they applied to have the estate declared insolvent, that the debts against the estate, amounted to \$14,604 and the assets to \$9,110: *Held*, that the testimony showed, beyond a reasonable doubt, that M. and his wife were not acting in good faith towards the creditors, and that they had concocted a plan by which the property should be sold for a trifle, and bought in for their benefit; and that sales so made are fraudulent in fact, and in law, and it is the duty of the probate court to set them aside and order the property to be resold. *Ib.*
22. The probate court may refuse to confirm an administrator's report of a sale

fraudulently made, set aside the sale, and order the property to be resold, without notice to the purchaser at such fraudulent sale. *Ib.*

23. Where a testator directs in his will that his slaves shall be transported to Africa, under the superintendence of the American Colonization Society, and that the executors shall sell certain portions of the estate and pay over the proceeds to the society, to be applied by them to the payment of expenses incurred in transporting the slaves to Africa, and supporting them when there, both the executors and the society are constituted trustees; it is the duty of the executors to deliver the slaves to the society for the purposes of the will; and it is the duty of the society to carry out those purposes; and if the executors will not discharge their duty, and interpose obstacles to the execution of the trust by the society, clearly a court of equity may enforce the performance.

Wade v. American Colonization Society, 663.

24. By the will of R. his slaves were directed to be transported to Africa, under the direction and superintendence of the American Colonization Society; the provisions of the will were declared valid by the judgment of the high court of errors and appeals, and the slaves declared entitled to an inchoate right of freedom, which would be perfect by their removal from the state; the legislature subsequently, in 1842, passed an act giving twelve months for the removal of slaves heretofore liberated, and declaring the bequest of freedom void if they be not so removed; one of the executors of R. detained the slaves in this state against their will, and against the will of the society and of his co-executors, until the twelve months, allowed by the act of 1842, expired; before the twelve months however had expired, the society, after using every means in its power to comply with the requisitions of the act, without suit, filed a bill to compel the executors to execute the trusts created by the will: *Held*, that the acts of the executor constituted such a fraud, that neither he nor any one claiming by virtue of his acts acquired any right; that the fraud of the executor placed him beyond the pale of the act of 1842, and that act did not therefore apply to the case. *Ib.*

FRANCHISE.

1. Where the assignees of a turnpike road company sue for tolls for passing over their road, it is not necessary to make profert in the declaration of the grant of franchise, the transfer, and the authority to exact toll; they are all matters of evidence. *Dulaney v. Starke*, 375.
2. D. sued S. & B. to recover tolls for the passage of their stages over the turnpike road of D.; the declaration alleged, that S. & B. were indebted to D. for certain tolls due for passage on and over the turnpike road of D., which had been duly granted by an act of the legislature of the state of Mississippi to G. and by G. transferred to D.; S. & B. demurred to the declaration and the court sustained the demurrer: *Held*, that the declaration was good, and the demurrer should have been overruled. *Ib.*

FRAUD.

1. Fraud vacates all contracts, and whenever it is charged, must be answered ; yet if the fraud be charged in a case which will not justify the rescission of the contract, or in a case in which the court cannot give relief, it need not be answered. *Walker v. Gilbert*, 456.
- 2 It is well established, that, if a party has a knowledge that he has been defrauded, and yet subsequently confirms the original contract by making new agreements and engagements respecting it, he thereby waives the fraud, and abandons his claim to equitable relief.
Edwards v. Roberts, 544.
3. E. purchased of R. certain lands, and took a bond for title; and becoming apprehensive that R. would not be able to make a good title to all of the land embraced in the purchase, he instituted suit on the bond; pending the suit, it was agreed between the parties to submit to arbitration, the amount to be allowed E. in the premises; the arbitrators not being able to agree, E. and R. determined to divide the difference that subsisted between arbitrators, and an award was made accordingly; which was recorded as a part of the proceedings in the action on the title bond, and entered as the judgment of the court; and E. gave to R. a new note in accordance with the terms of the award: *Held*, that whatever might have been E.'s equitable right to relief on account of fraud practised upon him in the sale of the land, by consenting to abide the result of an arbitration upon the matters in dispute, and giving a new note in accordance with the terms of the award, he virtually reaffirmed the contract, and relinquished any right to relief he might have previously possessed. *Ib.*

FORTHCOMING BOND.

1. Where the maker and indorser are sued separately since the act of 1837, and the maker give a forthcoming bond, it will not be a satisfaction of the judgment against the indorser; nothing but an actual payment of the one would be a satisfaction of the other. *Benton v. Crowder*, 185.
2. A motion to quash a forthcoming bond after the return term, comes too late, and cannot be sustained. *Parkinson v. Waldron*, 189.
3. But if on a writ of error *coram nobis*, a motion be made to quash a forthcoming bond, after the return term, and the motion be considered merely as a mode of bringing up the merits of the case under the writ of error *coram nobis*, and not as an independent motion to quash the forthcoming bond, and upon instigation it should appear that the bond was absolutely void, the court might perhaps order the bond to be set aside as a nullity. *Ib.*
4. A forthcoming bond for the delivery of "one lot of dry goods," and made payable to the plaintiffs, by their copartnership name, is not void, but at most only erroneous and voidable. *Ib.*
5. A forthcoming bond after forfeiture becomes, by operation of law, a judg-

ment, which extinguishes the original judgment, and also all liens created by that judgment. *Chilton v. Cox*, 791.

GAMING.

1. In an indictment under the act of 1839, chap. 26, entitled "An act further to suppress and discourage gaming," it is not necessary to state the individual game of cards played; the charge that the defendant "did play at a game at cards," is sufficiently definite for any reasonable or legal purpose. *Johnston v. The State*, 59.
2. On the trial of the defendant, for suffering a gaming table to be exhibited in the house occupied by him, the court refused to instruct the jury, "that if the accused had let the rooms of his house in which the exhibition of the faro-bank took place, to certain persons, and that at the time when he left them, he had no knowledge or expectation that they would be used for that purpose, they must find for the defendant; *held*, that the instruction was properly refused; and that the tenants of the accused were equally subject to the statute. *Mount v. The State*, 277.

GIFT.

1. As between donor and donee the gift of a chattel is incomplete without delivery or some act equivalent to delivery; if at the time the thing given be susceptible of transmission, *actual* delivery is not necessary; it may be constructive or symbolical. *Carrudine v. Collins*, 428.
2. It seems that the delivery of a deed, or having it recorded, the declarations of the donor, the situation of the parties, are circumstances which the jury may take into consideration on the question as to whether there was a delivery from the donor to the donee; but without the jury are satisfied that there was a delivery, they cannot find that it was a gift. *Ib.*

GRAND JURY.

A grand jury, composed of all the regular venire in attendance on the court, being twelve in number, and two persons summoned by the sheriff, under the direction of the court from the bystanders, is a good and legal grand jury. *Johnston v. State*, 68.

GRANT.

Although, as an abstract proposition, it is true that a grantor who disposes of land by a valid operative deed, cannot subsequently dispose of the same land by a valid operative deed to a different person; yet if the original conveyance be defective, the second of course would pass the estate; whether if the same person claim under both grants, he may establish his right under either, as he may please. *Quere? Sessions v. Reynolds*, 130.

GUARDIAN AND WARD.

1. The probate court of Adams county granted to S., guardian, &c., permission "to erect out of the funds of his wards, a building upon their lot in Natchez, of such dimensions and quality as may suit their interest:" *Held*, that the court did not thereby intend to authorize the guardian to erect a building upon credit, and thereby destroy the interest of his wards.
Payne v. Stone, 367.
2. The probate court has no power to authorize the erection of buildings upon the real estate of minors, which may involve the necessity of selling that estate to pay for them. *Ib.*
3. The probate court of Adams county, upon the petition of S. as guardian of his wards, granted him permission "to erect out of the funds of said wards, a building upon their lot in Natchez, of such dimensions and quality as may suit their interest." Under that order, S. contracted with P. for the erection of a building: when the contract was completed, there were not sufficient funds to pay the expense, and P. filed his petition in the circuit court to obtain an order for the sale of the lot and building under the mechanic's lien law. To this petition a demurrer was filed on behalf of the wards, which was sustained, and the petition dismissed: *Held*, that there was no error in the judgment of the circuit court. *Ib.*
4. Whenever a trustee sells the trust estate and becomes himself the purchaser, the sale may be set aside at the option of the *cestui que trust*, as a matter of course; without regard to the fairness or unfairness of the sale; in setting the sale aside, however, the court will order the property to be resold; and if it should not bring a higher price on the second sale, then the original sale is confirmed, or the court, in its discretion, may set aside the sale entirely if necessary, and order the purchase-money to be refunded. The same rule applies to a purchase by a guardian of his ward's property.
Scott v. Freeland, 409.
5. Where a trustee has become the purchaser of his *cestui que trust's* property, if the *cestui que trust* do not in a reasonable time take steps, after he comes to a knowledge of the sale, or, if he be a minor, after his disability is removed, to set the sale aside, his assent to the purchase will be implied. Where, therefore, W. S. died, leaving five children, W. became guardian for two of them, B. for two, and F. for one, and the guardians applied for and obtained an order of sale of the realty of their wards, and F. became the purchaser; at the time of the sale the oldest of the wards was twenty years old, the youngest about twelve; ten years after the sale, the wards exhibited their bill against F. to have the sale set aside, because F., their guardian, was the purchaser of the property: *Held*, that the laches of the two oldest children, and their delay and neglect in not applying earlier to have the sale

- set aside, implied an affirmance of the sale by them, and precluded them from the relief they sought. *Ib.*
6. The assent of the *cestui que trust* to the purchase of the trust property by the trustee, in order to ratify the sale need not be express, it is often implied from circumstances, one of the strongest of which is a failure to take immediate steps, on the *cestui que trust's* obtaining knowledge of the sale, and being freed from disability, to have the sale set aside. *Ib.*
 7. Where the property of a ward has been purchased by his guardian, and the ward, on arriving at age, receives the value of the property sold, with a full knowledge of what had been done by his guardian, it is an affirmance of the purchase of the trust property by the guardian, and vests the property in him; though the reception by the ward of his distributive share, on his arrival at age, ought not to be construed too strongly against him, and ought not to operate to his prejudice when it is obvious that he acted without due precaution. *Ib.*
 8. W. filed her petition in the probate court, charging that her guardian, who was also her father, was habitually addicted to intemperance; habitually used profane and obscene language in the presence of his family, and permitted others to do the same; that he was fickle and petulant, at times harsh to his children, and always cruel to his slaves; was wholly destitute of business habits, wild, visionary, and reckless, in all his pecuniary schemes and transactions; was hopelessly insolvent, and wholly disqualified for the office of guardian; that he also suffered a member of his family to treat W. in a severe, harsh, and cruel manner; and the petitioner prayed that the letters of guardianship be revoked. The answer expressly denied the charges *seriatim*. Numerous witnesses were examined; some testified that W. was permitted to go thinly and uncomfortably clad, and had been seen with marks upon her person, which were said to have been inflicted by her step-mother, the wife of her guardian; and that her guardian was not a fit or capable person to discharge the duties of his office; but most of the witnesses testified that the guardian was competent to perform the duties of his office, and was kind and affectionate to W. and dressed and educated her as well as his circumstances would justify: *Held*, that the petition should be dismissed. *Whitney v. Whitney*, 770.
 9. The chancery rule, that an account will not be decreed, except upon an apparent indebtedness, does not apply to cases of guardians, when called upon to render an account in the probate court; it is the duty of a guardian, under the statute, to render an account annually; and a general statement, that the proceeds of the property in his hands was about equal to the expenses incurred in its management, is not such a report or account as is required by the statute. *Ib.*

HUSBAND AND WIFE.

1. It was settled at common law, that the contract of a married woman is void; and the act of 1839, familiarly known as the "woman's law,"

- does not extend her power of contracting or of binding herself or her property. *Davis v. Foy*, 64.
2. The effect of the act of 1839, is rather to take away from a married woman all power of subjecting her property to her contract, except in the particular mode, specified in the statute. *Ib.*
 3. A judgment at law cannot be rendered in a court of law, against a married woman on a promissory note made by her husband and herself. *Ib.*
 4. The general rule at common law, is that a *feme covert* having a separate estate, acts with regard to it as a *feme sole*; but that rule is changed by the act of 1839 of this state, which provides that the slaves owned by a *feme covert*, under the provisions of that act might be sold by the joint deed of the husband and wife executed, proved and recorded, agreeably to the laws then in force, in regard to the conveyance of real estate of *feme coverts* and not otherwise. *Frost v. Doyle*, 68.
 5. Since the act of 1839, a *feme covert* cannot convey or incumber or charge in any manner, her separate personal estate, in any other mode than that pointed out by that act; therefore slaves, the separate property of the wife, cannot be subjected to the payment of a note made jointly by the husband and wife; not even if the note were given for articles necessary for the plantation of the wife, and house-keeping purposes. *Ib.*
 6. F. & Co. filed a bill in the district chancery court against D. and wife, alleging that D. and wife had purchased from them a quantity of merchandise, comprising articles necessary for the use of the plantation and house-keeping purposes, for the payment of which, on a settlement of the account, they executed their joint note; that the wife of D. owned sundry slaves given to her by her mother as her separate property, which complainants prayed might be sold for the payment of the note: *Held*, that the note was not a charge on the separate property of the wife, and her slaves could not therefore be sold for the payment thereof. *Ib.*
 7. Under the act of 1839, with reference to married women, it being provided that the slaves owned by a *feme covert* under the provisions of that act, might be sold by the joint deed of the husband and wife, executed, proved and recorded agreeably to the laws now in force, in regard to the real estate of *feme coverts* and not otherwise; it was *held* that a married woman could not charge her separate personal estate, owned under the provisions of that statute, with any debt or liability, in any other mode than that pointed out in the statute; where, therefore, a married woman owning slaves under that act, executed a forthcoming bond jointly with her husband as sureties for a third party, which was forfeited, her slaves are not liable to be sold under execution on such bond; and a court of chancery will enjoin their sale. *Berry v. Bland*, 77.
 8. It seems by the common law to be now settled, that a *feme covert* is not liable personally for any debt, nor is her separate property in general liable in equity for the payment of her general debts or her general personal engagements; yet the fact that the debt has been contracted during cover-

- ture, either as a principal, or as a surety for her husband, or jointly with him, seems ordinarily to be held *prima facie* evidence to charge her separate estate, without any proof of a positive agreement or intention so to do.
9. A deed to a married woman is not void; as to third persons it is valid, whether she can be compelled to pay for it or not; that concerns the vendor alone; where therefore B. conveyed a lot of ground to J., a married woman, and J. and her husband sued H. in ejectment for the lot; *held*, that H. could not object to the validity of J.'s title, on account of her coverture.

Harman v. James, 111.

10. The marital rights of the husband to the property of his wife, cannot be defeated, unless an intention be clearly expressed, that the property is to be held for the separate use of the wife; nothing is to be implied against him.

Williams v. Claiborne, 488.

11. W. (in debt) and H. (possessed of large property) being about to marry, by deed of settlement before the marriage, convey to a trustee for H.'s sole and separate use, all her property, and the interest, income and proceeds thereof on trust: 1. For the use of W. and H. for their natural lives, subject to disposal by H. by will. 2. That H. should have, during her life, full control over the property, and that it should not be subject to W.'s debts or his control. 3. That the trustee might sell when requested: *Held*, that W. on the death of H. had no right in the property thus conveyed, or to a participation in the proceeds, income, or profits of it. *Ib.*

12. Where in one clause of a deed of marriage settlement between W. & H. the property was settled in trust for the use of W. & H. for their natural lives, and W. covenanted in the deed that the whole property and its proceeds should belong to H. for her sole and separate use; *held*, that he was estopped by his covenants from setting up any claim to the property on the death of H. *Ib.*

13. By marriage agreements the marital rights are excluded only to the extent that a valid legal instrument operates to do so; where therefore a deed of settlement, made in contemplation of marriage, made a limitation over of slaves to the intended wife for life, and after the life estate to the heirs of the tenant for life, and in default thereof to third parties, the limitation over being otherwise void, the fact that the slaves belonged to the wife at the time of the settlement and that the husband joined in the conveyance, will not render it valid; the limitation over being void and the husband by law being entitled to all the personal property of the wife at the time of the marriage, will be entitled also to such slaves. *Ib.*

INADEQUACY OF PRICE.

- Inadequacy of price, without fraud, is not a sufficient ground for setting aside a sale of land under execution. *DeLafield v. Anderson*, 630.

INDEMNITY.

1. Where a conveyance is made to sureties of the grantor, conditioned that the

conveyance shall be void if the grantor pays the debt on which the grantees are sureties, otherwise to remain in full force and virtue, although the creditor knows nothing of the deed; yet as its provisions are for his benefit, his assent to it will be presumed, and the deed will be held to be not only as an indemnity to the sureties, but as a security for the debt; the sureties will be regarded as trustees for the benefit of the creditor, and will have no right to discharge or defeat the trust, unless it be to a purchaser for a valuable consideration without notice. *Ross v. Wilson et al.* 753.

2. B. W. & Co. were indebted to R.; and W., one of the firm of B. W. & Co., gave his note with G. & D. as sureties thereon, for the payment of the debt. W. subsequently conveyed certain property to G. & D. on condition that if W. should pay the debt to R. and also a note due by W. to D., then the conveyance should be void; otherwise to remain in full force and virtue, which conveyance was duly recorded; B. W. & Co. were also largely indebted to W. W., and W. W. having obtained judgment against B. W. & Co., agreed with G. & D. to pay the debt W. owed D., if they would release all interest acquired by them under the conveyance to them by W., and they did so; and W. then conveyed the same property to W. W.; R. filed a bill to subject the property mentioned in the conveyance to G. & D. to the payment of his debt: *Held*, that the conveyance to G. & D. constituted them trustees for the benefit of R., and they did not discharge the trust by the release to W. W., he having notice of the debt to R.; but as the conveyance was also intended as a security for the debt due by W. to D., and as W. W. paid the debt to D., he ought, in equity, to be substituted to the rights of D.; that the property therefore should be sold, and the proceeds divided between R. and W. W. in proportion to the amount due R. and the debt W. W. paid to D. *Id.*

INDICTMENT.

In an indictment under the act of 1839, chap. 26, entitled "An act further to suppress and discourage gaming," it is not necessary to state the individual game of cards played; the charge that the defendant "did play at a game at cards," is sufficiently definite for any reasonable or legal purpose.

Johnston v. The State, 58.

INJUNCTION.

1. Where a fiat for an injunction is granted, it is the duty of the clerk not to issue it until the bond required by the fiat is executed; but if he do issue it, the service of it on a party is evidence to him that the preliminary bond has been duly executed; in a motion, therefore, against a sheriff for omitting to make due execution of a writ of *fiery facias*, his return that it was stayed by injunction will be a *prima facie* excuse which will be made conclusive by the production of the injunction, whether an injunction bond were given or not. *Duckworth v. Millsaps*, 308.

2. Where a subpoena and injunction are combined in the same writ, it is the duty of the clerk, out of whose office the subpoena issues, to indorse upon it that its effect is suspended as to the injunction until the party execute sufficient bond ; until the bond is executed, the writ has not the efficacy of an injunction. *Ib.*
3. Where a railroad company neglect to pay the owner of the soil the damages awarded him for their right of way through his land, and he is exposed to the transit of the cars of the company over his land for an indefinite period, with but little prospect of compensation, a court of equity can grant him an injunction restraining the company from the use of his land.
Stewart v. Raymond Railroad Co. 568.

INSOLVENT ESTATE.

1. Under the statute of this state which provides that when a person dies insolvent, his estate "both real and personal shall be distributed to and among all the creditors in proportion to the sum to them respectively due and owing," taken in connection with the statute that makes "all promises, contracts and liabilities of co-partners joint and several," the debts due by a deceased person individually, and as a partner will stand on exactly the same footing, and be entitled to equal satisfaction out of the insolvent estate. *Mr. C. J. SHARKEY, dissenting.*
Dahlgren v. Duncan, 280.
2. In such case if the creditor of the partnership have sued the surviving partners, and procured payment of any portion of the debt, the estate of the deceased will be entitled to the benefit of it ; if the creditor looks only to the estate of the deceased, and that pays more than its proportion, the representatives of the estate will stand in the place of the creditor, and substituted to his rights with reference to the other partners. *Ib.*
3. After the report of the commissioners of insolvency has been received and allowed, the probate court cannot at a subsequent term open it for any cause unless the former orders were null and void. *Ib.*
4. The case of *Robins v. Norcum*, 4 S. & M. 332, declaring the want of jurisdiction in the probate court of a petition by a creditor of an estate after the report of the commissioner of insolvency is allowed, to settle conflicting rights between creditors, cited and confirmed. *Ib.*

ISSUE.

1. It is error where four pleas are filed in a case, and issues joined to the country on two of them and demurrers filed to the other two, to proceed to trial and judgment on the issues to the country, without any disposal of the demurrers. *Harper v. Bondurant*, 397.
2. Where to an action of assumpsit, in which there is more than one count, and the defendants plead non assumpsit to the whole declaration, and special pleas to the first count, and the plaintiff demurs to the special pleas,

it is error for the court on sustaining the demurrer to enter a judgment final against the defendants, without a trial of the issue.

Heyfron v. Mississippi Union Bank, 434.

JEFFERSON COLLEGE.

- A1. junior patent predicated on a senior preëmption right, will overreach a senior patent to the assignees of Jefferson College, which issued in accordance with the provisions of the act of congress in favor of Jefferson College.

McAfee's heirs v. Keirn, 780.

2. A junior patent predicated on a reservation to a Choctaw Indian, under the treaty of Dancing Rabbit Creek, is a superior title to a senior patent to the assignees of Jefferson College. *Id.*



JEOPAILS (STATUTE OF.)

1. Where a writing obligatory made by two is sued upon, but only one of the obligors sued and two pleas are filed, the first alleging payment by one obligor and the other alleging payment by the other obligor, and a single replication professing to answer both pleas was filed, on which the defendant took issue, and a verdict was rendered for the plaintiff; it was held that though replication was defective, yet the mispleading was cured by the verdict by virtue of the statute of jeofails. The defendant should have demurred. *Barrow v. Wade*, 49.
2. A failure to join in issue by a similiter cannot, after verdict, be cause of reversal. *Harmon v. James*, 111.

JUDGMENT.

1. The lien of a judgment operates only on the interest of the judgment debtor at the date of its rendition; and cannot therefore prevail against the prior equitable lien of a vendee from such judgment debtor who has received from his vendor a bond for title and paid part of the purchase-money; though his bond for title has never been recorded. *Money v. Dorsey*, 15.
2. After a judgment by default, upon due notice on a three-months replevy-bond for rent, a clear case of error must be made out to entitle the defendant to a reversal. *Robinson v. White*, 39.
3. Where, in an action against an administrator as such, the judgment is rendered *de bonis propriis*, this court will reverse the judgment, but will render such judgment as the court below ought to have rendered. *Barrow v. Wade*, 49.
4. A judgment at law cannot be rendered in a court of law against a married woman on a promissory note made by her husband and herself. *Davis v. Foy*, 64.
5. A judgment without notice, and without the appearance of the party against whom it is rendered, is a nullity, and may be shown to be so, even when it comes collaterally in question. *Enos v. Smith*, 85.

6. If the amount sued for be not ascertained by an instrument of writing, nor a sum certain, a jury is necessary to inquire of damages. *Sandford v. Campbell*, 107.
7. C. sued S. in an action of debt, on two bills single, a promissory note and an open account, and a final judgment was rendered without a jury to inquire of damages; *held* to be erroneous. *Ib.*
8. The judgments of inferior courts are presumed to be correct, unless the contrary be shown; but where error has intervened which may have operated prejudicially, the injured party is entitled to a reversal, unless it appear of record affirmatively that the error was waived. *Ross v. Mims*, 121.
9. After judgment at law, equity cannot interpose to set it aside, upon grounds which might have been used as a defence at law, unless it were obtained by fraud. *Benton v. Crówder*, 185.
10. Where a separate suit was instituted against an indorser of a bill of exchange; and also a joint suit on the same bill against him and the other parties thereto, and on the same day judgments are rendered on both cases, in the separate against him and the joint suit for him, where he plead; *held*, that he could have no relief in equity, though the proceedings at law were irregular, as the plaintiff had no right to sue the indorser separately; yet the defendant should have appealed. *Ib.*
11. It is a general rule, that any one who seeks to reverse a judgment, must put his finger on the error, as every presumption is in favor of the correctness of judgments. *Green v. Creighton*, 197.
12. Where a petition under the mechanics lien law was filed against two persons, one of whom plead and the other made default, and judgment by default was rendered against the latter at one term, and judgment on the issue at the next term for a less sum was rendered against the other, it was *held* to be erroneous; as the plaintiff could not have in the same suit two distinct judgments for different sums. *Falconer v. Frazier*, 235.
13. In a petition under the mechanics lien law, nothing is affected by the judgment but the interest of the party to the record; if the party have no interest, the judgment will confer no lien; the lien will be confined to the actual interest; the rights of third persons not parties to the suit will remain as they were previously. *Ib.*
14. Where a plea has been filed and a demurrer to it sustained, and under the judgment *respondeat ouster*, another plea filed, the demurrer to which is overruled by the court below, but sustained on appeal to this court, the judgment of this court will be *quod recuperet*. *Atkinson v. Fortinberry*, 302.
15. Although a judgment without notice is void, yet if a bill be filed to obtain a new trial at law on the ground of want of notice of the pendency of the action at law, and the answer deny the want of notice, and there be no proof to sustain the allegation of the bill, the bill must be dismissed, without prejudice, if there has been no trial in the court below on the merits. *Wellons v. Newell*, 399.

16. N. filed a bill to obtain relief in equity against a judgment at law in favor of D. on a note which he averred he executed as a surety for the principal therein, with the understanding that D. was to be a co-surety with him ; but that D. was made payee, and indorsed the note as accommodation indorser to the person for whom it was intended, and when the note became due D. took it up and sued the maker thereon at law, and obtained judgment : *Held*, that the application came too late after judgment at law ; that it was concluded thereby from the defence. *Ib.*
17. Where a demurrer to a plea is overruled, it is erroneous to award judgment final for the defendants ; it should be *respondent ouster*. *Lang v. Fatherree*, 404.
18. Where to an action of *assumpsit*, in which there is more than one count, and the defendants plead *non assumpsit* to the whole declaration, and special pleas to the first count, and the plaintiff demurs to the special pleas, it is error for the court on sustaining the demurrer, to enter a judgment final against the defendants, without a trial of the issue. *Heyfron v. Mississippi Union Bank*, 434.
19. Where a demurrer to a plea is sustained, the judgment of the court should be *respondent ouster*, and not *quod recuperet*. *Ib.*
20. R. obtained judgment at law against W. ; and E. alleging himself to be the owner of the judgment, obtained from W. two notes in satisfaction of it, agreeing with W. that if he were not the owner of the judgment, he would return the notes thus given to W. ; whereupon the execution was returned satisfied ; J. B., alleging himself to be the owner of the judgment at law, entered a motion in the circuit court to have the satisfaction set aside, which was done by that court ; B. having become assignee of E. of the notes of W. received by E. as indemnity for a liability of his for E., sued W. at law on the notes, and obtained judgment ; W. being prevented by high water from being at court to defend the judgment, filed a bill in chancery to be relieved from the judgment on the notes : *Held*, that the notes, having been given on a condition which had failed, were not obligatory ; that the reason for not defending at law was sufficient ; and that B. being assignee of the notes, merely as an indemnity, took them subject to the equities between W. & E. ; and that the action of the circuit court in setting aside the entry of satisfaction, could not be collaterally questioned.
Brooks v. Whitson, 513.
21. Where a judgment of the circuit court is affirmed by the judgment of the high court of errors and appeals, the lien of the former is not destroyed. *Montgomery v. McGimpsey*, 557.
22. A purchaser, under an execution issued by the clerk of the circuit court, against the principal and sureties on the writ of error bond, upon the certificate of the clerk of the high court of errors and appeals, of an affirmance by that court, of a judgment of the circuit court, of land mortgaged by the judgment debtor between the time of the rendition of the judgment of the circuit court and its affirmance by the high court of errors and appeals, acquires a superior title, and will be preferred to the mortgagees. *Ib.*

23. Where the lien of a judgment upon slaves has once attached in one county, the removal of the slaves to another county, by the defendant, without the knowledge of the plaintiff, cannot defeat the lien of the judgment; such removal by the judgment debtor being a fraud upon the judgment creditor. *Chilton v. Cox*, 791.
24. A forthcoming bond after forfeiture, becomes by operation of law a judgment, which extinguishes the original judgment, and also all liens created by that judgment. *Ib.*

JUDGMENT CREDITOR.

1. Where a bond to make title on payment of the purchase-money is given, the vendor has a lien on the land for the payment thereof; and when the vendee has paid the whole or any part thereof, he has a lien on the land for the title, which will prevail against the lien of judgment creditor of the vendor whose judgment is subsequent to the agreement to convey and the receipt of the consideration money; it seems, however, that the lien of such vendee will not prevail against a *bona fide* purchaser from the vendor subsequent to the date of the title bond and payment of portion of the purchase-money, for a valuable consideration and without notice. *Money v. Dorsey*, 15.
2. The extent of the right of a judgment creditor of the vendor of real estate, who has given a bond for title on payment of the purchase-money, and received a portion thereof, is to subject the unpaid purchase-money in the hands of the vendee to the satisfaction of his judgment. *Ib.*
3. The authority of an attorney upon a general retainer to collect money, extends no further than to receive the amount in legal currency; if he accept anything else without special authority, the client may refuse to acknowledge it as a payment, and may reissue the execution; where, therefore, an attorney at law received of his client's judgment debtor the notes of third persons, and receipted for them as cash to the debtor, the creditor, it was *held*, might still proceed with the execution against the debtor, unless the debtor could show that the attorney was authorized to make the arrangement; and the attorney's statements at the time that he was so authorized, will not be evidence of such authority, especially where the attorney in his deposition states that he has no recollection of having had a special authority. *Garvin v. Lowry*, 24.
4. Where a judgment of the circuit court is affirmed by the judgment of the high court of errors and appeals, with damages, and land, which was mortgaged by the judgment debtor after the rendition of the judgment in the circuit court, but before the judgment of affirmance by the high court of errors and appeals, was sold under an execution issued by the clerk of the circuit court on the certificate of the clerk of the high court of errors and appeals, of the affirmance of the judgment, for enough to satisfy the judgment, damages and costs; *held*, that the purchaser acquired a title unincumbered by the mortgage, and the most that the mortgagee could claim would be the

amount of the damages as a sum not covered by the older judgment, and that must be claimed of the judgment creditor, and not of the purchaser. *Montgomery v. McGimpsey*, 557.

5. The act of 1840, requiring all banks in this state to receive their own issues in payment of all debts due to them, when attempted to be applied to the creditors of the banks, is in derogation of common right, and must be strictly construed. Where, therefore, the judgment creditors of a bank filed a bill against the bank and the judgment debtors of the bank, after an execution on their judgment against the bank had been returned "*nulla bona*," praying that the judgment debtors of the bank be required to pay the amount of their judgment against the bank, it was *held* that the complainants were not bound to receive the issues of the bank, or anything but gold and silver in payment of their debt; if the debtors to the bank had offered to pay the bank, or had been in readiness to do so by the possession of the notes of the bank, before the filing of the bill, the rule would have been otherwise. *Robson v. Benton and Manchester R. R. and Banking Co.* 724.
6. R. & A. having obtained a judgment against the Benton Bank for \$1573, and the bank being insolvent, they filed their bill on the 22d day of May, 1840, to subject a judgment which the bank had recovered against Y. and others for \$4266, to the payment of the judgment, in their favor, against the bank, and enjoined Y. and others from paying their debt to the bank; at the time the injunction was granted, the notes of the bank were worth only fifty-six cents on the dollar: *Held*, that R. & A. could not be compelled to receive the issues of the bank in payment of their debt; but inasmuch as Y. and others, under the act of 1840, had the right to pay the bank in her own issues, before they were enjoined from doing so, the value of those issues at the time they were enjoined, should constitute the measure of their liability; and therefore they were entitled to a credit of one dollar on their debt to the bank, for every fifty-six cents they were required to pay R. & A., and they could not in equity be compelled to pay more than would at that rate be sufficient to discharge their indebtedness to the bank. *Id.*

JURY.

Although persons not of the jury intrude upon them in their retirement, and one of the jury during their retirement separate himself from his fellows for a period, yet these facts, though irregularities and reprehensible, will not be grounds for reversing the judgment, when it does not appear by the record that any influence was attempted on the jury or the absentee, to procure the verdict rendered by them. *Graves v. Monet*, 45.

JUSTICE OF THE PEACE.

1. Cases brought from justices of the peace into the circuit court, may be

tried in the latter court, without any written pleadings whatever. *Hairston v. Francher*, 249.

2. Although the proceedings in causes brought from justices of the peace to the circuit court are *de novo*, and can be cancelled without any pleadings whatever, yet if the parties undertake to conduct and carry on the cause by the means of pleadings in writing, they will be held to the rules of pleading. *Atkinson v. Fortinberry*, 302.

LEASE.

1. In the case of the sale of the real estate of a deceased person, the record of the probate court must show that all the proceedings were regular, and that the citations were published according to law; such degree of strictness is not, however, necessary in the sale of chattels which go to the administrator to be administered; in such case, even though the record do not show that citations were published according to law, the sale will be valid and that though it be a lease for ninety nine years which is sold.

Dillingham v. Jenkins, 479.

2. A lease for ninety-nine years is of no higher degree than a lease for one year; both are mere chattels and go to the administrator to be administered.

Ib.

LIEN.

1. Where a bond to make title on payment of the purchase-money is given, the vendor has a lien on the land for the payment thereof; and where the vendee has paid the whole or any part thereof, he has a lien on the land for the title, which will prevail against the lien of judgment creditor of the vendor, whose judgment is subsequent to the agreement to convey, and the receipt of the consideration money; it seems, however, that the lien of such vendee will not prevail against a *bona fide* purchaser from the vendor, subsequent to the date of the title bond and payment of portion of the purchase-money, for a valuable consideration, and without notice. *Money v. Dorsey*, 15.
2. The extent of the right of a judgment creditor of the vendor of real estate, who has given a bond for title on payment of the purchase-money, and received a portion thereof, is to subject the unpaid purchase-money in the hands of the vendee, to the satisfaction of his judgment. *Ib.*
3. The lien of a judgment operates only on the interest of the judgment debtor at the date of its rendition; and cannot therefore prevail against the prior equitable lien of a vendee, from such judgment debtor, who has received from his vendor a bond for title, and paid part of the purchase-money; though his bond for title has never been recorded. *Ib.*
4. When a judgment of the circuit court, is affirmed by the judgment of the high court of errors and appeals, the lien of the former is not destroyed.

Montgomery v. McGimpsey, 557.

5. A purchaser under an execution, issued by the clerk of the circuit court,

against the principal and sureties on the writ of error bond, upon the certificate of the clerk of the high court of errors and appeals, of an affirmance by that court, of a judgment of the circuit court, of land, mortgaged by the judgment debtor, between the time of the rendition of the judgment of the circuit court and its affirmance by the high court of errors and appeals, acquires a superior title, and will be preferred to the mortgage. *Ib.*

6. Where the lien of a judgment upon slaves, has once attached in the county, the removal of the slaves to another county, by the defendant, without the knowledge of the plaintiff, cannot defeat the lien of the judgment; such removal by the judgment debtor being a fraud upon the judgment creditor.

Chilton v. Cox, 791.

LIMITATION IN A DEED.

1. By the law of Tennessee, where a slave is conveyed to one for life, and on the termination of the life estate then to the heirs of the body of the tenant for life, and in default thereof, to the grantor and his heirs, the absolute right and title to the slave was vested in the tenant for life.

Carroll v. Renich, 798.

2. By a contract made in Tennessee in contemplation of marriage, certain slaves owned by the wife were conveyed to a trustee "for the use of the wife during her natural life and from the termination of that estate to the heirs of her body and their heirs forever, and in case she should die without such heirs, or having such heirs they should die before they arrive at mature age, then to her brothers by her mother's side and their heirs forever." The marriage took place, the wife died soon after giving birth to a son, who lived to be sixteen years of age and died, the husband having moved with the property to this state; it was held, on a bill by the brothers of the full blood of the wife, that the property by the deed of marriage settlement, vested absolutely in the wife, and on her marriage in the husband. *Ib.*
3. Limitations in marriage agreements already executed, are subject to the same rules that limitations contained in other instruments are; it is only in cases of marriage articles, where the settlement is thereafter to be made and the trusts are executory, that an exception to the general rule is permitted. *Ib.*
4. By marriage agreements the marital rights are excluded, only to the extent that a valid legal instrument operates to do so; where therefore a deed of settlement made in contemplation of marriage, made a limitation over of slaves to the intender's wife for life, and after the life estate, to the heirs of the tenant for life, and in default thereof to third parties, the limitation over being otherwise void, the fact that the slaves belonged to the wife at the time of the settlement, and that the husband joined in the conveyance, will not render it valid; the limitation over being void, and the husband by law being entitled to all the personal property of the wife at the time of the marriage, will be entitled also to such slaves. *Ib.*
5. How far in this state a limitation in a deed after a life estate to the heirs of the

body of the tenant for life, and in default thereof, to third persons, is valid, and such third persons in default of such heirs will take,—*Quere?* It seems that the proviso to the section abolishing entails, which says “provided that any person may make a conveyance or devise of lands to a succession of donees then living, and the heir or heirs of the body of the remainder-men, and in default thereof to the right heirs of the donor in fee simple.” (H. & H. § 24, p. 348,) and also the statutes in regard to contingent limitations and executory devises, (H. & H. 349, § 26,) alter the common law on the subject of such limitations. *Ib.*

LIMITATIONS, STATUTE OF.

1. In 1818 a widowed mother purchased a slave, partly with funds of her own, and partly of her children, and received the slave into her possession, and in 1825, the mother having married again, her husband conveyed the slave and her increase to the children of the second marriage; in 1833, the children of the first marriage became of age, but took no steps to assert their rights to the slaves until 1841: *Held*, that they were barred by the statute of limitations. *Murdock v. Hughes*, 219.
2. Where a purchaser of property buys it with the money of another, the trust thereby created in favor of the party whose money is thus used, is an implied, and not an express one, and is subject to the statute of limitations; continuing, express trusts forming the only class protected from the operation of the statute; where therefore the trustee denies the right of the *cestui que trust*, and asserts an adversary claim, it is an abandonment of the fiduciary character, and the statute of limitations will commence running from that day, if there be no disability as to the other parties. *Ib.*
3. The statute makes it the duty of executors and administrators to cause publication to be made for the presentation of claims against the estates which they represent, to be commenced within two months after the granting of letters testamentary, &c.; the same statute also provides that all claims against the estates of decedents shall be presented to the executor, &c. within eighteen months after the publication of notice, for that purpose, by such executor, &c. The notice thus designed to be given is purely constructive, and the provisions of the law must be strictly pursued by executors, &c.; in order therefore to bar the claims of creditors of an estate because they had not been presented within eighteen months from the publication of the grant of letters, the executor or administrator must show affirmatively, that the publication was commenced within two months after the granting of letters testamentary, &c. *Pearl v. Conley*, 356.
4. The creditors of an estate are not bound to take notice of any publication made by executors and administrators, requiring the presentation of claims within eighteen months, &c. commenced after the expiration of two months from the date of the grant of letters. *Ib.*
5. It is not a good plea, in bar of an action on a note instituted in 1842, that on

the 7th of May, 1839, the plaintiff had recovered a judgment against the defendants on the same note sued on, which judgment was reversed on error, at the January term, 1841, of the high court of errors and appeals, and that more than one year had elapsed after the reversal of the judgment, before the plaintiff recommenced his suit. *Lang v. Fatheree*, 404.

6. The statute (H. & H. 571, § 101,) which provides that if in certain specified actions judgment be given for the plaintiff, and afterwards reversed, or if he obtain a verdict, and the judgment is given against him on motion in arrest of the judgment, then the plaintiff may commence an action within one year and not after, does not abridge the time of limitation, but enlarges the plaintiff's privilege, in case the bar has become complete, pending litigation; it therefore does not prevent a second suit after reversal, even though it be not instituted within one year after reversal, if the general statute of limitations had not run against it. *Ib.*
7. Such provision, prohibiting the action after a year has elapsed from reversal, cannot be made the subject of a plea; the defendant can plead only the general statute; when the plaintiff may reply that he sued within six years, and his judgment was reversed, and he sued again within one year after the reversal. *Ib.*
8. Under the statute of this state (H. & H. 413,) limiting the period in which claims must be presented against the estates of deceased persons, and providing that on a failure to present, the claim is barred, and the estate discharged from the debt, if a creditor who holds a note against a principal and sureties, fails after the death of the principal to present it to the administrator within the prescribed time, to save the bar of the statute, the sureties are not thereby discharged. *Cohea v. Commissioners Sinking Fund*, 437.
9. It seems that the statute limiting the period in which claims may be presented against estates of deceased persons, and providing among other things that on a failure to present, the estate is discharged from the debt, is but a statute of limitations. *Ib.*

MARRIAGE CONTRACT.

1. A marriage contract made in Tennessee by parties resident there at the time, and where the marriage also took place there, must be construed according to the laws of that state; it seems it would be otherwise if it were made with a view to its execution elsewhere. *Carroll v. Renick*, 798.
2. By a contract made in Tennessee, in contemplation of marriage, certain slaves owned by the wife were conveyed to a trustee "for the use of the wife during her natural life, and from the termination of that estate to the heirs of her body and their heirs forever; and in case she should die without such heirs, or having such heirs, they should die before they arrive at mature age, then to her brothers by her mother's side and their heirs forever." The marriage took place, the wife died soon after giving birth to a son, who lived to be sixteen years of age and died; the husband having moved with the property to this state, it was held on a bill by the brothers

of the full blood of the wife, that the property by the deed of marriage settlement vested absolutely in the wife, and on her marriage, in the husband.

Ib.

3. Limitations in marriage agreements already *executed*, are subject to the same rules that limitations contained in other instruments are; it is only in cases of marriage articles, where the settlement is thereafter to be made and the trusts are *executory*, that an exception to the general rule is permitted. *Ib.*
4. By marriage agreements the marital rights are excluded only to the extent that a valid legal instrument operates to do so; where, therefore, a deed of settlement made in contemplation of marriage, made a limitation over of slaves to the intender's wife for life, and after the life estate, to the heirs of the tenant for life, and in default thereof to third parties, the limitation over being otherwise void; the facts that the slaves belonged to the wife at the time of the settlement, and that the husband joined in the conveyance, will not render it valid; the limitation over being void, and the husband by law being entitled to all the personal property of the wife at the time of the marriage, will be entitled also to such slaves. *Ib.*

MARRIED WOMAN.

1. It was settled at common law, that the contract of a married woman is void; and the act of 1839, familiarly known as the "woman's law," does not extend her power of contracting or of binding herself or her property. *Davis v. Foy*, 64.
2. The effect of the act of 1839 is rather to take away from a married woman, all power of subjecting her property to her contracts except in the particular mode specified in the statute. *Ib.*
3. A judgment at law cannot be rendered in a court of law against a married woman on a promissory note made by her husband and herself. *Ib.*
4. The general rule at common law, is that a *feme covert* having a separate estate, acts with regard to it as a *feme sole*: but that rule is changed by the act of 1839 of this state, which provides that the slaves owned by a *feme covert* under the provisions of that act, might be sold by the joint deed of the husband and wife, executed, proved and recorded agreeably to the laws then in force in regard to the conveyance of real estate of *feme coverts*, and not otherwise. *Frost v. Doyle*, 68.
5. Since the act of 1839, a *feme covert* cannot convey or incumber, or charge in any manner her separate personal estate in any other mode than that pointed out by that act; therefore slaves, the separate property of the wife, cannot be subjected to the payment of a note made jointly by the husband and wife; not even if the note were given for articles necessary for the plantation of the wife and housekeeping purposes. *Ib.*
6. F & Co. filed a bill in the district chancery court against D., alleging that D. and wife had purchased from them a quantity of merchandise, comprising articles necessary for the use of the plantation and housekeeping pur-

poses, for the payment of which on a settlement of the account they executed their joint note; that the wife of D. owned sundry slaves given her by her mother, as her separate property, which complainants prayed might be sold for the payment of the note; *held*, that the note was not a charge on the separate property of the wife, and her slaves could not therefore be sold for the payment thereof. *Ib.*

7. Under the act of 1839 with reference to married women, it being provided that the slaves owned by a *feme covert* "under the provisions of that act, might be sold by the joint deed of the husband and wife, executed, proved and recorded agreeably to the laws now in force in regard to the real estate of *feme coverts* and *not otherwise*;" it was held that married woman could not charge her separate personal estate owned under the provisions of that statute with any debt or liability, in any other mode than that pointed out in the statute; where, therefore, a married woman owning slaves under that act, executed a forthcoming bond jointly with her husband as sureties for a third party, which was forfeited, her slaves are not liable to be sold under execution on such bond; and a court of chancery will enjoin their sale. *Berry v. Bland*, 77.
8. It seems by the common law to be now settled, that a *feme covert* is not liable personally for any debt, nor is her separate property in general, liable in equity for the payment of her general debts or her general personal engagements; yet the fact that the debt has been contracted during coverture, either as a principal or as a surety for her husband, or jointly with him, seems ordinarily to be held *prima facie* evidence to charge her separate estate without any proof of a positive agreement or intention so to do. *Ib.*
9. A deed to a married woman is not void; as to third persons, it is valid, whether she can be compelled to pay for it or not; that concerns the vendor alone; when, therefore, B. conveyed a lot of ground to J. a married woman, and J. and her husband sued H. in ejectment for the lot; *held*, that H. could not object to the validity of J.'s title on account of her coverture.

Harman v. James, 111.

MASTER AND SLAVE.

1. The rule of the liability of the master for the act of his slave, seems to be limited to cases in the way of trade or public employment, or where any injury is occasioned to another by any act done by a slave in pursuance of his master's directions, but not for proceedings of a slave unauthorized by the master. *Leggett v. Simmons*, 348.
2. The liability of a master in a civil action for the felonious killing by his slave of the slave of another, seems to depend upon the criminal knowledge or agency of that master in the transaction. *Ib.*
3. The authority from a master to his slave to do an act, or the agency of a master in a transaction of his slave, may be gathered from the circumstances surrounding the occurrence. *Ib.*

S. sued L. in an action of trespass to recover the value of a slave supposed to have been killed by the slave of L. and proved that his slave visited the plantation of L., and upon his own, the slave's request, twice received from L. a dram of spirits in company with a slave belonging to L., who is supposed to have taken the life of S.'s slave, that during the night L. was aroused from his sleep by a clamor among his slaves, which was found to proceed from the two slaves to whom he had given the drams; and that as L. approached them armed with a gun, the slave of S. rushed upon him and discharged his gun; after which L. took no steps to drive S.'s slave away, but permitted him to remain upon his premises; that L. in a short time was again aroused by a similar clamor, and approaching the spot, he beheld first, the two slaves in a struggle together, and next the slave of S. pursuing and threatening the life of his, L.'s, slave, and thereupon, as the difficulty seemed to cease, L. left the spot and returned into his house, and the next morning the slave of S. was found dead upon the spot where the last quarrel took place: *Held*, that the facts do not amount to sufficient proof that L. commanded or authorized his slave to take the life of the slave of S., and that S. could not therefore recover. *Ib.*

MECHANICS' LIEN LAW.

1. In a suit at law by petition, under the mechanic's lien law, to subject alleged property of the defendant to the payment of an alleged mechanics' lien, in favor of the plaintiff; if the defendant be a non-resident it is error to grant an order of publication against him, and in proof thereof to render a judgment by default against him; such judgment will be absolutely void for want of due notice. *Falconer v. Frazier*, 235.
2. Where a petition under the mechanics' lien law was filed against two persons, one of whom plead and the other made default, and judgment by default was rendered against the latter at one term, and judgment on the issue at the next term for a less sum was rendered against the other, it was *held* to be erroneous; as the plaintiff could not have in the same suit two distinct judgments for different sums. *Ib.*
3. In a petition under the mechanics' lien law, the title to the property sought to be subject to the lien cannot be brought in issue; and issue therefore tendered by the defendant to such a petition that he was neither proprietor nor lessor of the premises, will be an immaterial one. *Ib.*
4. In a petition under the mechanics' lien law, nothing is affected by the judgment but the interest of the party to the record; if the party have no interest, the judgment will confer no lien; the lien will be confined to the actual interest; the rights of third persons not parties to the suit will remain as they were previously. *Ib.*
5. The probate court of Adams county, upon the petition of S. as guardian of his wards, granted him permission "to erect out of the funds of said wards, a building upon their lot in Natchez of such dimensions and quality as may

suit their interest." Under that order S. contracted with P. for the erection of a building. When the contract was completed, there were not sufficient funds to pay the expense, and P. filed his petition in the circuit court to obtain an order for the sale of the lot and building under the mechanics' lien law; to this petition, a demurrer was filed on behalf of the wards, which was sustained and the petition dismissed: *held*, that there was no error in the judgment of the circuit court. *Payne v. Stone*, 367.

MORTGAGE.

1. The statutes passed by the legislature for the regulation of proceedings in chancery, are to be applied to such suits in the circuit courts; final decrees, therefore, may be entered by the circuit courts at the same term a bill is taken for confessed, such course being authorized by the statute in regard to the superior court of chancery. *Dowell v. Sanders*, 206.
2. There is no rule of the circuit court requiring a commissioner to whom an account is referred to state and report the amount due the complainant in a bill to foreclose a mortgage, to give the defendant notice of the time and place of taking the account; yet if no such notice be given, and the defendant object to a confirmation of the commissioner's report on that ground, and at the same time shows any good reason for a recommitment of the account, the objection should be sustained and the recommitment made. But if the defendant permits the commissioner's report to be confirmed by the court without objections, he must be taken to have waived any he may have had to it. *Ib.*
3. It is necessary that a sale of mortgaged premises made by a commissioner under a decree of foreclosure should be confirmed by the court. *Ib.*
4. A purchaser, under an execution issued by the clerk of the circuit court, against the principal and sureties on the writ of error bond, upon the certificate of the clerk of the high court of errors and appeals, of an affirmance by that court, of a judgment of the circuit court, of land mortgaged by the judgment debtor between the time of the rendition of the judgment of the circuit court and its affirmance by the high court of errors and appeals, acquires a superior title, and will be preferred to the mortgagee.
Montgomery v. McGimpsey, 557.
5. Where a judgment of the circuit court is affirmed by the judgment of the high court of errors and appeals, with damages, and land, which was mortgaged by the judgment debtor after the rendition of the judgment in the circuit court, but before the judgment of affirmance by the high court of errors and appeals, was sold under an execution issued by the clerk of the circuit court on the certificate of the clerk of the high court of errors and appeals, of the affirmance of the judgment, for enough to satisfy the judgment, damages and costs; *held*, that the purchaser acquired a title unincumbered by the mortgage, and the most that the mortgagee could claim would be the amount of the damages as a sum not covered by the older judgment, and that must be claimed of the judgment creditor, and not of the purchaser.
Ib.

NEW TRIAL.

1. Where the charge of the court is in accordance with the law, but the jury find contrary thereto, and to the testimony, and the court below refuse to grant a new trial, the court of errors and appeals will interpose and grant the new trial. *Garvin v. Lowry*, 24.
2. Although persons not of the jury intrude upon them in their retirement; and one of the jury during their retirement separated himself from his fellows for a period; yet these facts, though irregularities and reprehensible, will not be grounds for reversing the judgment, when it does not appear by the record that any influence was attempted on the jury or the absentee to procure the verdict rendered by them. *Graves v. Monet*, 45.
3. To entitle a party to a new trial on the ground of surprise, he must show merits, and the surprise must be of such a character as care and prudence could not provide against; the slightest negligence will defeat the application for a new trial, or occasion the imposition of the most rigorous terms. *Thompson v. Williams*, 270.
4. Where a suit was instituted against several defendants, in May, 1841, and a trial had, and judgment rendered against them all, in November 1843, and there was nothing in the record showing that the verdict and judgment were incorrect; and one of the defendants filed an affidavit, as the foundation of a motion for a new trial, stating that on the day before the trial, it was agreed between the plaintiff and himself, that the case should not be tried until they could make an effort to compromise it, and he relying upon that agreement, went home, and returned the next day, and found the case in the progress of trial before the jury; and that the disposition manifested to compromise the suit, and the agreement to let the case stand, prevented him from asking leave of the court to put in a defence which had arisen since the commencement of the suit, namely, his discharge under the bankrupt law, and the motion for a new trial was overruled: *Held*, that the defence offered by the defendant went merely to his personal discharge, and not to the merits of the action; and that he had moreover been guilty of negligence, in not making application to put in his defence at the first term of the court, after his discharge occurred, for which no excuse was offered, and the court did right in overruling the motion for a new trial. *Ib.*
5. Although a judgment without notice is void, yet if a bill be filed to obtain a new trial at law on the ground of want of notice of the pendency of the action at law, and the answer deny the want of notice, and there be no proof to sustain the allegation of the bill, the bill must be dismissed without prejudice, if there has been no trial in the court below on the merits.
Wellons v. Newell, 399.
6. N. filed a bill to obtain relief in equity against a judgment at law in favor of D. on a note which he averred he executed as a surety for the principal therein, with the understanding that D. was to be a co-surety with him;

but that D. was made payee and indorsed the note as accommodation indorser to the person for whom it was intended, and when the note became due, D. took it up, and sued the maker thereon at law, and obtained judgment; *held*, that the application came too late after judgment at law; that N. was concluded thereby from the defence. *Ib.*

7. R. obtained judgment at law against W. and E., alleging himself to be the owner of the judgment, obtained from W. two notes in satisfaction of it, agreeing with W. that if he were not the owner of the judgment he would return the notes thus given to W., whereupon the execution was returned satisfied; P. B. alleging himself to be the owner of the judgment at law, entered a motion in the circuit court to have the satisfaction set aside, which was done by that court; B. having become assignee of E. of the notes of W., received by B. as indemnity for a liability of his for E., sued W. at law on the notes, and obtained judgment; W. being prevented by high water from being at court to defend the judgment, filed a bill in chancery to be relieved from the judgment on the notes; *Held*, that the notes having been given on a condition which had failed, were not obligatory; that the reason for not defending at law was sufficient, and that B. being assignee of the notes merely as an indemnity, took them subject to the equities between W. and E., and that the action of the circuit court in setting aside the entry of satisfaction could not be collaterally questioned.

Brooks v. Whitson, 513.

8. It is well settled in courts of equity, as well as law, that a party is not entitled to relief after verdict, upon testimony, which with ordinary care and diligence he might have procured and used upon the trial at law.

Lee v. Hooker, 601.

9. L. sued H. in an action of assumpsit for medical services, and recovered a judgment; H. some time thereafter, filed a bill in chancery, praying for an injunction, and a new trial, upon the ground of evidence discovered since the trial at law, which newly discovered evidence consisted of the opinions of physicians as to the nature of the disease under which H. was suffering, without showing any good reason why those opinions were not procured before the trial at law: *Held*, that an ordinary degree of diligence would have brought to light the newly discovered evidence as well before the trial as since; and that the injunction should be dissolved, and the bill dismissed. *Ib.*

10. If a notice for a new trial be overruled by the circuit court, the high court of errors and appeals may reverse the judgment of the court below, either on account of an improper exclusion of evidence, or because the evidence greatly preponderated against the finding of the jury; but a new trial will not be granted unless it clearly appears that justice has not been done in the court below; or where it appears that the jury found according to the weight of the evidence, or where there is little reason to suppose that a different result would ensue on another trial. A new trial will not therefore be granted because a deposition was improperly ruled out by the court

below, which if admitted, would not have justified a verdict in favor of the party offering it. *Bohr v. Steamboat Baton Rouge*, 715.

NOMINAL PLAINTIFF.

When an instrument not assignable is sued on, in the name of one for the use of another, the nominal plaintiff cannot discharge or release the action. Courts of law will protect the equitable right of the assignee, by compelling the nominal plaintiff to permit his name to be used for the recovery of the claim. All the nominal plaintiff can require is indemnity against costs. *Anderson v. Miller*, 586.

NON-RESIDENT.

the contract of a foreigner is to be completed in, or has reference to its execution in, a foreign country, and is repugnant to the laws of that country, he is bound by them. *Wooten v. Miller*, 380.

NUL TIEL RECORD.

the issue on a plea of *nul tiel record* is to the court, and where the judgment or order to which it was interposed was read to the jury upon the trial, without exception, the influence is plain either that the plea was disposed of or waived by the party. *Thompson v. Williams*, 270.

OVERSEER OF ROADS.

An overseer of roads cannot maintain an action before a justice of the peace, against a person for obstructing the highway, unless he has first obtained a judgment of the board of police against the obstructor under the statute (H. & H. 450, § 29; 453, § 41,) which makes it the duty of the overseer of roads to remove all obstructions upon roads, and charge the expense thereof to the offenders, and report the number of days of the obstruction and the expense of removal, to the board of police, which was authorized to enter judgment thereon; which judgment, if for an amount less than fifty dollars is recoverable by suit before a justice of the peace.

Hairston v. Francher, 249.

PATENT.

A patent may be impeached for illegality or fraud, and declared void in a court of law, as well as in a court of chancery.

Hit-tuk-ho-mi v. Watts, 363.

A patent which issues from the general government to land which has been previously appropriated by the government and reserved from entry, is void. *Id.*

An Indian, claiming under the 14th article of the treaty of Dancing Rabbit Creek, who has brought himself within the provisions of that article of the treaty, is clothed with a perfectly legal title, which will prevail against a

patent subsequently issued by the general government to the reservation of such Indian. *Ib.*

4. A junior patent predicated on a senior preëmption right, will overreach a senior patent to the assignees of Jefferson College, which issued according to the provisions of the act of congress in favor of Jefferson College. *McAfee v. Keirn*, 780.
5. A junior patent predicated on a reservation to a Choctaw Indian, under the treaty of Dancing Rabbit Creek, is a superior title to a senior patent to the assignees of Jefferson College. *Ib.*

PARTIES.

Where the addition of "junior" is affixed to the name of a party against whom process is issued, and the officer returns the process served upon the nomination of the party, omitting only the addition of "junior," in the absence of any proof showing that the process was in fact served upon the wrong individual, the presumption is, that the officer did his duty, and executed his process upon the right person. *Sanders v. Dowell*, 206.

PARTNERSHIP.

1. Where one of two partners subscribes the partnership name to a note as sureties for a third person without the authority or consent of the other partner, the latter are not bound; and it lies upon the plaintiff to prove the consent or authority of the other partners: such consent or authority may be presumed from sufficient circumstances. *Andrews v. Planters Bank*, 193.
2. V. & A. were partners in trade; V. the active partner; A. in the habit of frequenting the store, but not managing the business. V. was in the habit of indorsing the firm name of V. & A. and signing it as sureties for third persons, and notices of the coming due of such liabilities were often left at the store of V. & A. but it was not proved that they were ever brought to the knowledge of A. except in one instance, where he denied V.'s authority so to use the firm name: *Held*, that the facts were not sufficient to uphold a verdict against A. on a note signed by V. & A. as sureties. *Ib.*
3. Under the statute of this state, which provides that when a person dies insolvent, his estate, "both real and personal, shall be distributed to and among *all* the creditors, in proportion to the sums to them respectively due and owing;" taken in connection with the statute that makes "all promises, contracts and liabilities of copartners joint and several," the debts due by a deceased person individually and as a partner, will stand on exactly the same footing and be entitled to equal satisfaction out of the insolvent's estate. Mr. C. J. SHARKEY dissenting. *Dahlgren v. Duncan*, 280.
4. In such case, if the creditor of the partnership have sued the surviving partners, and procured payment of any portion of the debt, the estate of the deceased will be entitled to the benefit of it; if the creditor looks only to the estate of the deceased, and that pays more than its proportion, the representatives of the estate will stand in the place of the creditor and substituted to his rights with reference to the other partners. *Ib.*

PAYMENT.

1. If the owner of land through which a company wishes to run a railroad, agree to refer to arbitrators the question of damages to be paid by the company for the right of way, and there be no express agreement that time shall be given for the payment of the damages awarded, the damages must be paid, before the right of way can vest in the company.

Stewart v. Raymond Railroad Company, 568.

2. He who seeks to compel a specific performance of a contract, must do all that is incumbent upon him, or he cannot succeed. Where, therefore, a railroad company agreed with the owner of land to refer to arbitrators the question of how much the company shall pay him for the right of way over his land, they cannot prevent him from the exercise of full ownership over the land until they have paid, or tendered to him the damages awarded. *Ib.*
3. A purchaser of land who, at the time of purchase, executed a deed of trust to secure the purchase-money, cannot convey to a company, even an easement over the land, except subject to the payment of the purchase-money; when therefore such a purchaser did convey to a company an easement over the land, and the land was subsequently sold under the deed of trust, and the purchaser at the trust sale, agreed with the company to refer to arbitrators the question of damages they should pay him for the enjoyment of the easement; it was *held*, that the company were not entitled to an indefinite credit for the payment of the damages awarded, and to the enjoyment of the easement, until the payment of the money; but that they were bound to pay, or tender the amount of damages before they could have any right to the enjoyment of the easement. *Ib.*
4. It is settled that if a party who is indebted on a mortgage and simple contract, or on a bond and simple contract, makes a payment, and omits to apply it specially to one of the debts, the law will make the application in the way most beneficial to the debtor, that is, to the mortgage or bond.

Poindexter v. La Roche, 699.

5. Where a person who is indebted both on a bond and on a judgment, sells his land, and the purchaser makes the creditor a payment, without applying it to either the bond or judgment, the law will apply it to the judgment in exoneration of the land. *Ib.*
6. E. purchased land of P. which was incumbered by a mortgage executed by P. to W., as the agent of L., to secure the money contracted to be paid by P. to W. as the agent of L. for the land; W. also held a claim in his own right against P., not included in the mortgage; E. being indebted to P. for the land, paid the money to W. on P.'s account, not knowing that P. was indebted to W. individually, and without making any application of the payment: *Held*, that W. had no right to apply the payment to his individual debt, and that the law would apply it to the reduction of the incumbrance resting upon the land. *Ib.*

PLEA.

1. The special plea of *retraxit* is a good plea under the practice of this state ; and it is therefore error to strike such a plea out and treat it as a nullity.
Williams v. The Northern Bank of Mississippi, 28.
2. A plea denying the character in which the plaintiff sues, and not supported by oath or affirmation, where the face of the record does not evidence the truth of the fact set forth by the plea, is not merely informal, but is deficient in one of the substantial requisites of the statute, and may be stricken out as a nullity. *Prewitt v. Bennett*, 101.
3. It is no doubt the law, that a judgment upon a *retraxit* is as much a bar to another suit for the same cause between the same parties, as a judgment after verdict ; it is the admission by the plaintiff on the record that he has no cause of action which constitutes the bar and operates as an estoppel.
Coffman v. Brown, 125.
4. A plea that "a suit had been previously brought for the same cause of action between the same parties in which the plaintiff in his own proper person came into court, and confessed that he would not further prosecute his said suit against the said defendant, but from the same altogether withdraw himself, whereupon it was considered by the court that the plaintiff should take nothing, and that the defendant go without day," does not show a *retraxit* nor a bar to the plaintiff's right of action. *Ib.*
5. If a plea be defective in form, yet appropriate to the action and going to its substance, it is error to strike it out or reject it ; it must be disposed of by demurrer. *Johnston v. Beard*, 214.
6. It seems where a demurrer to a declaration is overruled, and the defendant offers a good plea in bar of the action, with an affidavit of its truth attached to it, such affidavit will be equivalent to an affidavit of merits, and the plea ought to be received. *Ib.*
7. The issue on a plea of *nul tiel record* is to the court ; and where the judgment or order to which it was interposed was read to the jury upon the trial, without exception, the inference is plain, either that the plea was disposed of or waived by the party. *Thompson v. Williams*, 270.
8. Where a demurrer to a plea is overruled, it is erroneous to award judgment final for the defendants ; it should be *respondeat ouster*. *Lang v. Fatherree*, 404.
9. Where a demurrer to a plea is sustained, the judgment of the court should be *respondeat ouster*, and not *quod recuperet*. *Heyfron v. Mississippi Union Bank*, 434.
10. It seems a plea *puis darrein* continuance in this state, is not a waiver of other pleas previously filed. *Ib.*
11. Where a demurrer was filed to a plea, and the record did not state in so many words that the demurrer was sustained ; but it appeared in the record that the defendant, under a judgment of *respondeat ouster* plead again ; *held*,

that the record showed sufficiently that the demurrer had been sustained. *Smith v. Elder*, 507.

2. Where pleas were filed on which issues were taken, and another plea to which a demurrer was sustained, and on a judgment of *respondeat ouster* the defendant plead a similar plea, to which a like demurrer was filed, of which last demurrer the record showed no disposition, but the parties went on to trial on the issues made up; *held*, that under the circumstances, this court would presume that the parties waived the last demurrer. *Ib.*

PLEADING.

Where a writing obligatory made by two is sued upon, but only one of the obligors sued and two pleas are filed, the first alleging payment by one obligor, and the other alleging payment by the other obligor, and a single replication professing to answer both pleas was filed, on which the defendant took issue, and a verdict was rendered for the plaintiff; it was *held*, that though replication was defective, yet the misleading was cured by the verdict by virtue of the statute of jeofails. The defendant should have demurred. *Barrow v. Wade*, 49.

Cases brought from justices of the peace into the circuit court, may be tried in the latter court, without any written pleadings whatever. *Hairston v. Francher*, 249.

Although the proceedings in causes brought from justices of the peace to the circuit court are *de novo*, and can be conducted without any pleadings whatever; yet if the parties undertake to conduct and carry on the cause by the means of pleadings in writing, they will be held to the rules of pleading. *Atkinson v. Fortinberry*, 302.

Where a plea has been filed, and a demurrer to it sustained, and under the judgment *respondeat ouster*, another plea filed, the demurrer to which is overruled by the court below, but sustained on appeal to this court, the judgment of this court will be *quod recuperet*. *Ib.*

The statute H. & H. 597, § 43, which declares that it shall be lawful for a defendant in any suit to plead as many pleas in bar of the action as he shall choose, although some of said pleas may be to the party, or to the character of the parties suing, embraces pleas in abatement. *James v. Dowell*, 333.

D. sued S. & B. to recover tolls for the passage of their stages over the turnpike road of D.; the declaration alleged, that S. & B. were indebted to D. for certain tolls for passage on and over the turnpike road of D., which had been duly granted by an act of the legislature of the state of Mississippi to G., and by G. transferred to D. S. & B. demurred to the declaration, and the court sustained the demurrer; *held*, that the declaration was good, and the demurrer should have been overruled. *Dulaney v. Starke*, 375.

It is error where four pleas are filed in a case, and issues joined to the country on two of them, and demurrers filed to the other two, to proceed to

trial and judgment on the issues to the country, without any disposal of the demurrers. *Harper v. Bondurant*, 397.

8. A bill to set aside a sale of land, under execution, making the several purchasers at the sale, though they bought different and distinct interests, and the plaintiffs in the execution, under which the sale was made, all defendants, is not multifarious, on account of the improper joinder of parties.

Delafield v. Anderson, 630.

PRACTICE.

1. If a plea be defective in form, yet appropriate to the action and going to its substance, it is error to strike it out or reject it; it must be disposed of by demurrer. *Johnston v. Beard*, 214.
2. It is error where four pleas are filed in a case and issues joined to the country on two of them, and demurrers filed to the other two, to proceed to trial and judgment on the issues to the country, without any disposal of the demurrers. *Harper v. Bondurant*, 397.
3. Where to an action of assumpsit, in which there is more than one count, and the defendants plead *non assumpsit* to the whole declaration and special pleas to the first count, and the plaintiff demurs to the special pleas, it is error for the court on sustaining the demurrer to enter a judgment final against the defendants, without a trial of the issue. *Heyfron v. Mississippi Union Bank*, 434.
4. It seems that it is improper to allow a supplemental bill which contains nothing that was not fully known to the complainant at the time he filed his original bill; but if such a supplement be filed, and be not objected to in the court below, and the chancellor entertain jurisdiction of it, the objection will not prevail in this court. *Walker v. Gilbert*, 456.
5. The interpretation of the chancellor of the rules of his court, are a safe precedent for this court; and where, notwithstanding a rule of practice that no motion to discharge an injunction on the face of the bill, would be received, yet, if the chancellor entertain such motion, it will be considered that the chancellor considered the rule inapplicable to the case; and it seems that such a rule ought not to apply to a case where no decree could be made, if the facts were admitted. *Id.*

PREÉMPTION RIGHT.

1. The right of preëmption granted to the actual settler by the acts of congress, in 1830 and 1834, although a gratuity, constitutes as valid a right as if it were founded on a valuable consideration; and creates an equity in favor of the occupant which excludes all other rights, and which could only be lost by a failure to make the entry within the time prescribed by the acts.

McAfee v. Keirn, 780.

2. Where an actual settler, claiming a preëmption right, has fully complied with the requisitions of the law, and received a patent, his title must be

regarded as superior in a court of equity, to any title acquired by mere entry, and a patent on it, although it be older than the patent under the pre-emption right; the patent relates to the inception of title, and in a court of equity, the person who has first appropriated has the best title. *Ib.*

3. A junior patent predicated on a senior pre-emption right, will overreach a senior patent to the assignees of Jefferson College, which issued according to the provisions of the act of congress in favor of Jefferson College. *Ib.*

PRINCIPAL.

In a controversy between two sureties on a note for contribution, the principal, being equally liable to both, stands indifferently between them, and is a competent witness. *Hunt v. Chambliss*, 532.

PROBATE COURT.

1. After distribution of the estate of a deceased person under an order of the probate court, the superior court of chancery has not jurisdiction of a bill by a person alleging himself to be a distributee, whose claims had been overlooked or disregarded in the distribution in the probate court, against one of the other distributees to recover from him a ratable proportion of the estate. The remedy was in the probate court. *Gaines v. Smiley*, 53.
2. Where, on an application to the probate court to remove an executor for mal-administration, oral testimony was given, but not taken down at the time, the executor having time given him until the next term to reduce it to writing; and after the decision of the court removing the executor, he had the witnesses re-examined before a justice of the peace and their testimony taken down, and the clerk of the probate court certifies to the correctness of the transcript of the evidence; *held*, that the high court of errors and appeals could not notice the testimony; it was irregular to re-examine the witnesses after trial; the evidence under the statute should have been taken down and recorded at the time. *Ross v. Mims*, 121.
3. Where a claim was rejected by commissioners appointed by the probate court to audit claims against an insolvent estate, and afterwards referred to referees and by them allowed, and exceptions taken to the report of the referees, which were sustained by the court, and the report set aside; it was *held*, that the decree of the probate court setting aside the report of the referees was not conclusive against the validity of the claim, and it was competent for the probate court to re-commit the claim to referees. *Green v. Creighton*, 197.
4. The probate court has no jurisdiction of a bill filed by the assignee of an open account against the assignor and the administrator of the administratrix of the debtor in the open account, to compel the administrator to pay the account to the assignee, on the ground that the administratrix in her lifetime had promised the payment of it to the assignee, provided the account

- should be allowed to her in the settlement of her intestate's estate, and that it had been so allowed; but the administratrix had not paid it; and the assignor claimed it as being due to him. *McCoy v. Rhodes*, 296.
5. If the probate court cannot grant full and adequate relief in cases of trust arising under a will, the chancery court may take jurisdiction.

Wade v. American Colonization Society, 663.

PROCESS.

Where the addition of "junior" is affixed to the name of a party against whom process is issued, and the officer returns the process served upon the nomination of the party, omitting only the addition of "junior," in the absence of any proof showing that the process was in fact served upon the wrong individual, the presumption is, that the officer did his duty, and executed the process upon the right person. *Sanders v. Dowell*, 206.

PROFERT.

Where the assignees of a turnpike road company sue for tolls for passing over their road, it is not necessary to make profert in the declaration of the grant of franchise, the transfer, and the authority to exact toll; they are all matters of evidence. *Dulaney v. Starke*, 375.

PUBLICATION.

1. In a suit at law by petition, under the mechanics' lien law, to subject alleged property of the defendant to the payment of an alleged mechanics' lien in favor of the plaintiff, if the defendant be a non-resident, it is error to grant an order of publication against him, and on proof thereof to render a judgment by default against him; such judgment will be absolutely void for want of due notice. *Falconer v. Frazier*, 235.
2. The statute makes it the duty of executors and administrators to cause publication to be made for the presentation of claims against the estates which they represent, to be commenced within two months after the granting of letters testamentary, &c.; the same statute also provides that all claims against the estates of decedents shall be presented to the executor, &c. within eighteen months after the publication of notice, for that purpose, by such executor, &c. The notice thus designed to be given is purely constructive, and the provisions of the law must be strictly pursued by executors, &c.; in order therefore to bar the claims of creditors of an estate because they had not been presented within eighteen months from the publication of the grant of letters, the executor or administrator must show affirmatively, that the publication was commenced within two months after the granting of letters testamentary, &c. *Pearl v. Conley*, 356.
3. The creditors of an estate are not bound to take notice of any publication made by executors and administrators, requiring the presentation of claims within eighteen months, &c. commenced after the expiration of two months from the date of the grant of letters. *Ib.*

PURCHASER.

d. purchased at marshal's sale two negroes, and sold them to H., who gave his notes for the purchase-money; M., when the notes became due, sued H. on the notes and recovered judgment, and H. moved for a new trial: it was proved that H. wanted to purchase the negroes for his daughter, but was unwilling to do so unless the title of M. was good; that M. refused to give any more than a mere quitclaim to the negroes; that M. purchased them under an execution against A. W. H., against whom there was also another judgment which was known to both M. and H., and its lien canvassed at the time H. was contracting with M. for the negroes; that they both then believed that M.'s title to the negroes, acquired by his purchase at the marshal's sale, was paramount to the lien of the other judgment, and under that impression H. purchased the negroes, and gave his notes, and received from M. his quitclaim; and that the negroes were subsequently seized and sold under an execution which issued on the other judgment. The court overruled the motion for a new trial: *Held*, that both parties were equally cognizant of the facts relative to the title of M. to the negroes; that M. was guilty of no fraud; and the motion was properly overruled. *Hutcheson v. Minis*, 388.

PURCHASER WITHOUT NOTICE.

. Where a bond to make title on payment of the purchase-money is given, the vendor has a lien on the land for the payment thereof; and when the vendee has paid the whole or any part thereof, he has a lien on the land for the title, which will prevail against the lien of judgment creditor of the vendee, whose judgment is subsequent to the agreement to convey and the receipt of the consideration money; it seems, however, that the lien of such vendee will not prevail against a *bona fide* purchaser from the vendor subsequent to the date of the title bond and payment of portion of the purchase-money, for a valuable consideration and without notice.

Money v. Dorsey, 15.

. M. bought a piece of land from P. and paid part of the price in cash, and received a bond for title on payment of the residue; P. afterwards sold the same land to C., who resold it to M.; subsequent to the sale by P. to M., but before the sale by P. to C., a judgment was recovered by D. against P., and execution thereon levied on the same land; *held*, that M. was entitled to an injunction against the sale; that P. had not an interest capable of sale under execution; and was a mere trustee of the title for M., whose interest was not affected by the sale to C., though it might have been otherwise if C. had set up that he was a *bona fide* purchaser for a valuable consideration, without notice of the previous sale to M. *Ib.*

. By the statute of the Mississippi territory, which made all deeds not recorded within twelve months from their date of execution void as against

a subsequent purchaser or mortgagee without notice; a subsequent purchaser or mortgagee from the same source or grantor is meant; as to all those claiming title from a different source, the unregistered deed would be as valid without recording as with it; where therefore a deed was made in 1806, from a person claiming under a Spanish grant, and the deed was not recorded until 1841, and in 1823 the United States government granted a patent to the land to a different party, the deed from the Spanish grantee would not be void as against such patentee. *Sessions v. Reynolds*, 130.

4. R. obtained judgment at law against W.; and E. alleging himself to be the owner of the judgment obtained from W. two notes in satisfaction of it, agreeing with W. that if he were not the owner of the judgment he would return the notes thus given to W.; whereupon the execution was returned satisfied; P. B. alleging himself to be the owner of the judgment at law, entered a motion in the circuit court to have the satisfaction set aside, which was done by that court; B. having become assignee of E. of the notes of W. received by B. as indemnity for a liability of his for E. sued W. at law on the notes and obtained judgment; W. being prevented by high water from being at court to defend the judgment, filed a bill in chancery to be relieved from the judgment on the notes; *held*, that the notes having been given on a condition which had failed, was not obligatory; that the reason for not defending at law was sufficient; and that B. being assignee of the notes merely as an indemnity, took them, subject to the equities between W. & E.; and that the action of the circuit court in setting aside the entry of satisfaction could not be collaterally questioned.

Brooks v. Whiston, 513.

5. Where a conveyance is made to sureties of the grantor conditioned that the conveyance shall be void, if the grantor pays the debt on which the grantees are sureties, otherwise to remain in full force and virtue although the creditor knows nothing of the deed, yet as its provisions are for his benefit, his assent to it will be presumed, and the deed will be held to be not only as an indemnity to the sureties, but as a security for the debt; the sureties will be regarded as trustees for the benefit of the creditor, and will have no right to discharge or defeat the trust, unless it be to a purchaser for a valuable consideration without notice. *Ross v. Wilson*, 753.

RAILROAD.

1. If the owner of land through which a company wishes to run a railroad, agree to refer to arbitrators, the question of damages to be paid by the company for the right of way, and there be no express agreement that time shall be given for the payment of the damages awarded, the damages must be paid before the right of way can vest in the company.

Stewart v. Raymond Railroad Company, 568.

2. He who seeks to compel a specific performance of a contract, must do all that is incumbent upon him, or he cannot succeed. Where, therefore, a railroad company agreed with the owner of land to refer to arbitrators the

- question of how much the company shall pay him for the right of way over his land, they cannot prevent him from the exercise of full ownership over the land, until they have paid or tendered to him the damages awarded. *Ib.*
3. A purchaser of land, who at the time of purchase executed a deed of trust to secure the purchase-money, cannot convey to a company even an easement over the land, except subject to the payment of the purchase-money. Where, therefore, such a purchaser did convey to a company an easement over the land, and the land was subsequently sold under the deed of trust, and the purchaser at the trust sale agreed with the company to refer to arbitrators the question of damages they should pay him for the enjoyment of the easement; it was *held* that the company were not entitled to an indefinite credit for the payment of the damages awarded, and to the enjoyment of the easement until the payment of the money; but they were bound to pay or tender the amount of damages before they could have any right to the enjoyment of the easement. *Ib.*
 4. The doctrine in regard to the dedication of land to public uses has no sort of application to that class of cases arising out of the right of a railroad company to run their road through land without first paying the owner thereof the damages awarded to him for their so doing. *Ib.*
 5. Whether the road of a railroad company is subject to sale under an execution at law? *Quere? Ib.*
 6. Where a railroad company neglect to pay the owner of the soil the damages awarded him for their right of way through his land, and he is exposed to the transit of the cars of the company over his land for an indefinite period, with but little prospect of compensation, a court of equity can grant him an injunction restraining the company from the use of his land. *Ib.*

REAL ESTATE.

1. The interest of the vendor in land who has given a bond for title on payment of the purchase-money, and who has received a portion thereof from the vendee, is not subject to seizure and sale under execution at law at the suit of a judgment creditor who has obtained his judgment since the date of the title bond, and the payment of such portion of the purchase-money. *Money v. Dorsey*, 15.
2. Where the grantor in a deed is sued for a breach of his covenant of warranty, and the alleged breach consists of the recovery of dower in the land conveyed, by an order of the probate court, it is clearly competent for the grantor to show that the land embraced in his deed was not subject to the dower allotted out of it, and to preclude him from such defence is error. *Enos v. Smith*, 85.
3. In an action of ejectment by the vendee of one tenant in common against those claiming under his co-tenant, it is incompetent to prove by parol the declaration of the plaintiff's vendor that he had, many years previous, conveyed all his interest in the land in controversy to his co-tenant, under whom

- the defendant claimed. If such conveyance were lost, it could be set up by bill in equity. *Harman v. James*, 111.
4. Where a bond for title is given, the interest of the vendee is not the subject of execution sale at law, unless the purchase-money has all been paid; and where a party to a suit in ejectment, claims title through a purchase at sheriff's sale of the interest of such vendee, it seems it is incumbent on him to show that the purchase-money has all been paid by such vendee at the time of the execution sale. *Ib.*
 5. In an action on a note given for land, in which the defendant, under the plea of non assumpsit, offered proof to show that the plaintiff had not title to the land for which the notes were given, it is not competent for the plaintiff to show by parol, that there was a mistake in the description of the land in the title bond; and that the defendant was really put into possession of the land sold and had enjoyed it ever since; such proof may be made in a court of equity, but not of law. *Pegues v. Mosby*, 340.

RECORD.

1. When the record does not purport to set out all the testimony, this court will presume that all written evidence spread out in the record was properly proved in the court below, to render it competent testimony.
Caillaret v. Bernard et ux. 319.
2. Where a demurrer was filed to a plea, and the record did not state in so many words that the demurrer was sustained, but it appeared in the record that the defendant, under a judgment of *respondeat ouster*, plead again: *Held*, that the record showed sufficiently that the demurrer had been sustained. *Smith v. Elder*, 507.
3. Where pleas were filed on which issues were taken, and another plea to which a demurrer was sustained, and on a judgment of *respondeat ouster*, the defendant plead a similar plea, to which a like demurrer was filed, of which last demurrer the record showed no disposition, but the parties went on to trial on the issues made up: *Held*, that under the circumstances, this court would presume that the parties waived the last demurrer. *Ib.*

REFEREES.

1. Where claims against the estate of a decedent were referred by the probate court to referees, who made a report which was received and confirmed; and the parties, by an agreement, entered of record in the probate court, agreed that the former order, appointing referees, and also their report to set aside, and the claims in controversy referred to other referees; and the last named referees reported in favor of the claims, and their report was approved and confirmed by the court; it was *held* that if any objection existed to the original appointment of referees, the party waived it by agreeing to set aside their appointment and report, and to the appointment of other referees. *Regan v. Stone*, 104.

2. A report of referees to whom a claim against an insolvent estate was referred, which shows that the amount of the penalty of an administrator's bond was allowed as a valid claim against the estate, without any proof of a breach of the conditions of the bond, or of damages actually sustained by the parties interested, is erroneous on its face, and may be set aside by the probate court, on exceptions being taken to it. *Green v. Creighton*, 197.
3. Referees to whom a claim against an insolvent estate is referred by order of the probate court, are not bound to report the evidence upon which they found their report; yet in all cases they ought to do so, as that is the only way by which the judgment of the appellate court can be had on the validity of the claim referred to them. *Ib.*
4. The recital in the bill of exceptions that counsel relied, in the probate court, on the hearing exceptions taken to the report of referees to whom a claim against an insolvent estate, founded on an administration bond, had been referred, upon a decree of said court, fixing the amount of the administrator's liability on the bond, as evidence in support of the report of the referees, will not justify the high court of errors and appeals in deciding that there was such a decree, or that it was sufficient evidence to support the report, when no such decree appears in the record. *Ib.*
5. Where a claim was rejected by commissioners appointed by the probate court to audit claims against an insolvent estate, and afterwards referred to referees, and by them allowed, and exceptions taken to the report of the referees, which were sustained by the court, and the report set aside, it was held, that the decree of the probate court, setting aside the report of the referees, was not conclusive against the validity of the claim; and it was competent for the probate court to recommit the claim to referees. *Ib.*

• REGISTRATION.

By the statute of the Mississippi territory which made all deeds not recorded within twelve months from their date of execution void as against a subsequent purchaser or mortgagee without notice; a subsequent purchaser or mortgagee from the same source or grantor is meant; as to all those claiming title from a different source, the unregistered deed would be as valid without recording as with it; where therefore a deed was made in 1806 from a person claiming under a Spanish grant, and the deed was not recorded until 1841, and in 1823 the United States government granted a patent to the land to a different party, the deed from the Spanish grantee would not be void as against such patentee. *Sessions v. Reynolds*, 130.

RELEASE.

1. A deed which purports to remise, release, and quit-claim title to land, is competent testimony on behalf of the releasee therein, forever; though the words be not sufficient to pass an entire estate in land, yet they are sufficient to perfect a title in one having claim of title, and therefore as a link in the chain of title, depending for its effect upon its connection with other in-

struments or evidence, and as a constituent part of title, such deed is competent testimony. *Sessions v. Reynolds*, 130.

2. It seems that a mere release of title to land, does not pass the right to land of which another person is in the actual visible possession, claiming a right ; yet it may be used as a conveyance of the estate to one in possession, or as a means of transferring or enlarging an estate by giving some new interest, or as perfecting an imperfect and defeasible estate ; and it seems that any interest in the person to whom the release is made, either by possession or in deed, or in land, in his own or another's right, any vested interest without an actual possession will be a sufficient foundation for the release to stand upon. *Ib.*
3. In a country abounding in wild land, a deed or grant is a constructive possession in the grantee, sufficient to uphold a title derived by release from one having title to the land ; where, therefore, the Spanish government granted the same land first to R. and afterwards to F. and R. subsequently released to F. the constructive possession of F. under his grant, will be sufficient to uphold the release from R. *Ib.*
4. Where a release of title to land was thirty-five years old, it was held to be of an age sufficient to draw to its support the favorable presumption of the law, that it was operative at the time of its execution ; which presumption is supported by proof of the possession of the releasee, as far back as there is any evidence of possession. *Ib.*
5. The title to the whole of a tract of land, with possession of part of it, is a possession of the whole of it, and will support a release of title to the whole. *Ib.*
6. In order to defeat a release, it seems there should be proof of an actual adverse possession, under a claim of right ; therefore, where the releasee was in possession long before there was any adverse claim, or for anything that appeared to the contrary, was in possession when the release was made, it was held that the release would be operative. *Ib.*
7. The objection to a release on the ground of the want of possession or other interest in the releasee, at the time of its execution, loses much of its force when made in this court for the first time ; and when the objection made to its admissibility, in the court below, was as to its authenticity. *Ib.*

RENT.

1. After a judgment by default, upon due notice, on a three months' replevy bond for rent, a clear case of error must be made out to entitle the defendant to a reversal. *Robinson v. White*, 39.
2. It is no objection to a three months' replevy bond for rent, that it does not recite to whom the rent is due ; the obligor is estopped by the bond from denying that the rent is due ; and if the bond be made payable to the constable, a payment to him before assignment will be valid ; and so also will a payment to his assignee ; and a motion and judgment on such bond, by the assignee, would be a bar to all future action upon it. *Ib.*

- . The proceeding by motion for an award of execution on a replevin bond after a distress for rent, is a summary remedy, and must therefore conform to the statute in all material respects. *Tyft v. Virden*, 91.
- . The bond is the foundation of the jurisdiction of the court ; therefore it must appear upon the record that the bond had been lodged in the office of the clerk of the court, or the court has no power to award an execution. *Ib.*
- . If the record shows that the bond was lost before it was ever lodged in the proper office, the court cannot take jurisdiction of the case. *Ib.*

REPLEVY BOND.

- . It is no objection to a three months replevy bond for rent, that it does not recite to whom the rent is due ; the obligor is estopped by the bond from denying that the rent is due ; and if the bond be made payable to the constable, a payment to him before assignment will be valid ; and so also will a payment to his assignee ; and a motion and judgment on such bond, by the assignee, would be a bar to all future action upon it.

Robinson v. White, 39.

- . The proceeding by motion for an award of execution on a replevin bond after a distress for rent, is a summary remedy ; and must therefore conform to the statute in all material respects. *Tyft v. Virden*, 91.
- . The bond is the foundation of the jurisdiction of the court ; therefore it must appear upon the record that the bond had been lodged in the office of the clerk of the court, or the court has no power to award an execution. *Ib.*
- . If the record shows that the bond was lost before it was ever lodged in the proper office, the court cannot take jurisdiction of the case. *Ib.*

RETRAXIT.

- . The special plea of *retraxit* is a good plea under the practice of this state ; and it is therefore error to strike such a plea out, or treat it as a nullity.

Williams v. The Northern Bank of Mississippi, 28.

- . It is no doubt the law that a judgment upon a *retraxit* is as much a bar to another suit for the same cause between the same parties, as a judgment after verdict ; it is the admission by the plaintiff, on the record, that he has no cause of action which constitutes the bar and operates as an estoppel.

Coffman v. Brown, 125.

- . A plea that " a suit had been previously brought for the same cause of action between the same parties, in which the plaintiff in his own proper person came into court, and confessed that he would not further prosecute his said suit against the said defendant, but from the same altogether withdraw himself, whereupon it was considered by the court that the plaintiff should take nothing, and that the defendant go without day," does not show a *retraxit*, nor a bar to the plaintiff's right of action. *Ib.*

RIGHT OF WAY.

1. If the owner of land through which a company wishes to run a railroad, agree to refer to arbitrators the question of damages to be paid by the company for the right of way, and there be no express agreement that time shall be given for the payment of the damages awarded, the damages must be paid before the right of way can vest in the company.

Stewart v. Raymond Railroad Company, 568.

2. He who seeks to compel a specific performance of a contract must do all that is incumbent upon him or he cannot succeed; where therefore a railroad company agreed with the owner of land to refer to arbitrators the question of how much the company shall pay him for the right of way over his land, they cannot prevent him from the exercise of full ownership over the land, until they have paid or tendered to him the damages awarded.

Ib.

3. A purchaser of land, who at the time of purchase executed a deed of trust to secure the purchase-money, cannot convey to a company even an easement over the land, except subject to the payment of the purchase-money; when therefore such a purchaser did convey to a company an easement over the land, and the land was subsequently sold under the deed of trust, and the purchaser at the trust sale agreed with the company to refer to arbitrators the question of damages they should pay him for the enjoyment of the easement; it was *held* that the company were not entitled to an indefinite credit for the payment of the damages awarded, and to the enjoyment of the easement until the payment of the money, but they were bound to pay or tender the amount of damages before they could have any right to the enjoyment of the easement. *Ib.*

4. The doctrine in regard to the dedication of land to public uses has no sort of application to that class of cases arising out of the right of a railroad company to run their road through land without first paying the owner thereof the damages awarded to him for their so doing. *Ib.*

5. Where a railroad company neglect to pay the owner of the soil the damages awarded him for their right of way through his land, and he is exposed to the transit of the cars of the company over his land for an indefinite period, with but little prospect of compensation, a court of equity can grant him an injunction restraining the company from the use of his land.

Ib.

SECURITY FOR COSTS.

Where a rule for security for costs has been allowed in the court below, and the record does not show that any motion to dismiss was made below for want of security, or that the security required by the rule was not given, and the cause progressed to judgment after the rule was taken; *held*, that the high court would not disturb the judgment. *Bullard v. Dorsey, 9.*

SET OFF.

1. There is no such plea given by our law as set off, and a demurrer to such plea is therefore properly sustained. *Bullard v. Dorsey*, 9.
2. A set-off must be mutual; that is, between the same parties; or as expressed in our statute, the parties "must be dealing together," otherwise it cannot be allowed. Where, therefore, W. sued B. & M. on a note payable to E. or bearer, and the defendants proposed to prove that E. transferred the note to W.; and while W. was bearer of it he was indebted to M. in a large amount by note, and had promised that M. should be allowed to credit the note sued on, on the note held by him: *held*, that the evidence was inadmissible; the individual debt of W. could not be set off against the joint debt of B. & M. *Ib.*
3. Where the plaintiff sues upon a joint note the defendants cannot set off a debt due by the plaintiff to one of the defendants in his own right. *Ib.*
4. J. W., with G. as his surety, executed a note to the executrix of M. W. J. W. died, and F. G. W., his administrator, who was one of the distributees of the estate of M. W., directed the executrix to retain the note out of his distributive share, which was not done; the executrix sued G., the surety of J. W., on the note, and G. plead payment: *Held*, that the debt being due from J. W., and the distributive share being due to his administrator, there was an absence of that mutuality which is essential to the right of set-off; that the executrix could not compel compliance with the direction of F. G. W., and it did not therefore amount to a payment of the note. *Wadlington v. Gary*, 522.

SHERIFF.

Where a fiat for an injunction is granted, it is the duty of the clerk not to issue it until the bond required by the fiat is executed; but if he do issue it, the service of it on a party is evidence to him that the preliminary bond has been duly executed; in a motion therefore against a sheriff for omitting to make due execution of a writ of *fieri facias*, his return that it was stayed by injunction will be a *prima facie* excuse, which will be made conclusive by the production of the injunction, whether an injunction bond were given or not. *Duckworth v. Millsaps*, 308.

SHERIFF'S RETURN.

The return of a sheriff, made upon process in discharge of duty required by law, which shows a reason or excuse for an omission to perform the duty required by the writ, is not conclusive evidence in favor of the officer; on a motion against the officer, predicated on such omission, his return may be impeached. *Duckworth v. Millsaps*, 308.

SHERIFF'S SALE.

1. The interest of the vendor in land who has given a bond for title on payment

of the purchase-money, and who has received a portion thereof from the vendee, is not subject to seizure and sale under execution at law at the suit of a judgment-creditor, who has obtained his judgment since the date of the title bond and the payment of such portion of the purchase-money.

Money v. Dorsey, 15.

2. M. bought a piece of land from P. and paid part of the price in cash, and received a bond for title on payment of the residue; P. afterwards sold the same land to C., who resold it to M.; subsequent to the sale by P. to M., but before the sale by P. to C., a judgment was recovered by D. against P., and execution thereon levied on the same land; *held*, that M. was entitled to an injunction against the sale; that P. had not an interest capable of sale under execution; and was a mere trustee of the title for M., whose interest was not affected by the sale to C., though it might have been otherwise if C. had set up that he was a *bona fide* purchaser for a valuable consideration, without notice of the previous sale to M. *Id.*
3. Where a bond for title is given, the interest of the vendee is not the subject of execution sale at law, unless the purchase-money has been paid; and where a party to a suit in ejectment claims title through a purchase at sheriff's sale of the interest of such vendee, it seems it is incumbent on him to show that the purchase-money has all been paid by such vendee at the time of the execution sale. *Harman v. James*, 111.
4. Inadequacy of price without fraud, is not a sufficient ground for setting aside a sale of land under execution. *Delafield v. Anderson*, 630.

SLAVES.

1. The rule of the liability of the master for the act of his slave seems to be limited to cases in the way of trade or public employment, or where any injury is occasioned to another by any act done by a slave in pursuance of his master's directions, but not for proceedings of a slave unauthorized by the master. *Leggett v. Simmons*, 348.
2. The liability of a master in a civil action for the feloniously killing by his slave of the slave of another, seems to depend upon the criminal knowledge or agency of that master in the transaction. *Id.*
3. The authority from a master to his slave to do an act, or the agency of a master in a transaction of his slave, may be gathered from the circumstances surrounding the occurrence. *Id.*
4. S. sued L. in an action of trespass to recover the value of a slave supposed to have been killed by the slave of L., and proved that his slave visited the plantation of L., and upon his own (the slave's) request twice received from L. a dram of spirits in company with a slave belonging to L., who is supposed to have taken the life of S.'s slave; that during the night L. was aroused from his sleep by a clamor among his slaves, which was found to proceed from the two slaves to whom he had given the drams; and that as L. approached them armed with a gun, the slave of S. rushed

- upon him and discharged his gun, after which L. took no steps to drive S.'s slave away, but permitted him to remain upon his premises; that L. in a short time was again aroused by a similar clamor, and approaching the spot he beheld first the two slaves in a struggle together, and next, the slave of S. pursuing and threatening the life of his (L.'s) slave, and thereupon, as the difficulty seemed to cease, L. left the spot and returned into his house, and the next morning the slave of S. was found dead upon the spot where the last quarrel took place; *Held*, that the facts do not amount to sufficient proof that L. commanded or authorized his slave to take the life of the slave of S., and that S. could not therefore recover. *Ib.*
5. In 1837, D. M., a citizen of North Carolina, placed in the possession of W., about to move to the state of Mississippi, a negro man to be sold or hired for him; W. brought the slave to this state, and sold him here to M. on a credit, and took M.'s note, and transferred it to his father in payment of a debt due by him to his father; the note was afterwards paid; and D. M. sued W. and his father in equity to recover the money, charging them with a fraudulent combination to cheat him out of it: *Held*, that the complainant was not entitled to recover; the introduction of the slave into this state was in violation of the law and constitution, and any contract, growing out of, or connected with, such violation, will not be enforced.
- Wooten v. Miller*, 380.
6. Where a non-resident employs an agent in this state to introduce or sell slaves here for him, and the agent does so introduce and sell the slaves, the principal cannot recover from the agent the proceeds of their sale; the non-residence of the principal not shielding him from the operation of our laws. *Ib.*
7. R. by his will directed that after his decease his slaves should be called together, and such of them as elected to go to Africa, the provisions of the will being first fully explained to them, should be sent there under the directions and superintendence of the American Colonization Society; that such of his slaves as did not elect to go to Africa, together with all the residue of his estate, except a few slaves, particularly mentioned, should be sold, and the proceeds after the payment of certain legacies, and all necessary expenses, be paid over to the American Colonization Society, to be appropriated first to paying the expenses of transporting his slaves to Africa, and secondly to their support and maintenance when there; the executors refused to sell any portion of the estate, or deliver the slaves to the American Colonization Society, as directed by the will, because, as they contended, the trusts created by the will were in violation of the policy of this state, and in fraud of the statute on the subject of manumission, and therefore illegal and void, and the American Colonization Society filed a bill in the superior court of chancery against the executors, to compel the execution of the trusts and to carry out the provisions of the will; the executors resisted the bill on the further ground that it related to a matter purely of administration, and cognizable only in the probate court. *Held*, that the trusts cre-

- ated by the will were legal and valid ; that the full measure of relief could only be attained in a court of equity, and therefore the court of chancery had jurisdiction. *Wade v. American Colonization Society*, 663.
8. Bequests made to slaves who are directed by the will to be transported to Africa and remain there, are not void for want of capacity in the legatees to take ; the slaves have an inchoate right to freedom under the will, which is complete as soon as they are removed out of this state. *Id.*
 9. Where a will directs that the slaves of the testator shall be transported to Africa, under the direction and superintendence of the American Colonization Society, and that the executors should sell certain portions of the estate and pay over the proceeds to the Colonization Society, to be used by them in paying the expenses of transporting the slaves to Africa, and for their support and maintenance when there ; the trusts are not void for want of capacity in the American Colonization Society to take for such purposes. *Id.*
 10. The American Colonization Society filed a bill against the executors of R., alleging that R., by his last will, directed his slaves to be sent to Africa under the superintendence and direction of complainants, and that the executors should sell certain portions of his estate and pay over the proceeds to complainants, provided they would agree to appropriate the same to paying the expenses of transporting the slaves to Africa and supporting and maintaining them when there ; that the complainants were duly and legally incorporated ; that they were willing to accept and appropriate the funds, as provided for in the will, the object of the society, by their charter, being in accordance with the provisions of the will and in furtherance thereof ; that by the decisions of the courts the will and provisions were fully established, and the rights of complainants to the slaves and estate, in trust as bequeathed in the will, and for the purposes therein contained, were fully confirmed, &c. The executors demurred to the bill, because there was no averment that the complainants were an incorporated society at the time of the testator's death, and because the complainants had no power or authority, under their charter, to take for the purposes and objects mentioned in the will ; the chancellor disallowed the demurrer: *Held*, that the demurrer was properly disallowed. *Id.*
 11. Where a testator directs in his will that his slaves shall be transported to Africa, under the superintendence of the American Colonization Society, and that the executors shall sell certain portions of the estate and pay over the proceeds to the society, to be applied by them to the payment of expenses incurred in transporting the slaves to Africa, and supporting them when there, both the executors and the society are constituted trustees ; it is the duty of the executors to deliver the slaves to the society for the purposes of the will ; and it is the duty of the society to carry out these purposes ; and if the executors will not discharge their duty, and interpose obstacles to the execution of the trust by the society, clearly a court of equity may enforce the performance. *Id.*

12. Whether, if a testator in his will directs that his slaves shall be sent to Africa, and the will constitutes no trustee to take them, any remedy exists to the slaves, *Quare? Ib.*
13. The American Colonization Society is not prohibited by its charter from transporting slaves directed by a will to be sent to Africa under the superintendence of the society. *Quare? Ib.*
14. By the will of R. his slaves were directed to be transported to Africa, under the direction and superintendence of the American Colonization Society; the provisions of the will were declared valid by the judgment of the high court of errors and appeals, and the slaves declared entitled to an inchoate right of freedom, which would be perfect by their removal from the state; the legislature subsequently, in 1842, passed an act giving twelve months for the removal of slaves heretofore liberated, and declaring the bequest of freedom void if they be not so removed; one of the executors of R. detained the slaves in this state against their will, and against the will of the society and of his co-executors, until the twelve months, allowed by the act of 1842, expired; before the twelve months however had expired, the society, after using every means in its power to comply with the requisitions of the act, without suit, filed a bill to compel the executors to execute the trusts created by the will: *Held*, that the acts of the executor constituted such a fraud, that neither he nor any one claiming by virtue of his acts acquired any right; that the fraud of the executor placed him beyond the pale of the act of 1842, and that act did not therefore apply to the case. *Ib.*
15. Whether the act of 1842, giving twelve months from and after its passage for the removal of slaves *heretofore* liberated, or directed by any last will and testament to be sent beyond the limits of this state, and declaring all such bequests of freedom void, if the slaves be not so removed, is valid and constitutional, as to cases arising under will, duly proved and admitted to record before its passage, — *Quare? Ib.*
16. Where the lien of a judgment upon slaves has once attached in one county, the removal of the slaves to another county, by the defendant, without the knowledge of the plaintiff, cannot defeat the lien of the judgment; such removal by the judgment debtor being a fraud upon the judgment creditor.

Chilton v. Cox, 791.

SPECIFIC PERFORMANCE OF CONTRACT.

1. A bill for a specific performance or for the rescission of a contract is addressed to the sound discretion of the court: no certain, definite rule can be laid down, which would determine when a party was or was not entitled to such relief. Where a complainant, seeking the rescission of a contract, has not done all that he stipulated to do, or has not placed himself in a situation to be ready to do so, upon compliance on the other side, the court will not interpose in his behalf. *Hester v. Hecker*, 768.
2. Where a party sold land and gave a bond for title, and also stipulated to deliver possession of the land upon the payment of a portion of the purchase-

money on a particular day; the purchaser failed to pay the money at the time specified, and the owner of the land subsequently sold it to a third person, and delivered possession to him; the latter sale was rescinded, and the owner filed a bill to compel a specific performance of the first contract: *Held*, that by the latter sale the vendor placed himself in a situation, in which he was not entitled to a decree for a specific performance against the first purchaser. *Ib.*

3. Hooker sold to Hester a tract of land and executed a title bond, in which he stipulated that he would surrender possession of the premises on the 1st day of September, 1838, upon the payment by Hester before that time of one of the notes given by him for the purchase-money, it being distinctly stated in the bond that the payment of the money should precede the delivery of possession; Hester failed to pay the money, and in October, 1838, Hooker sold the same land to Young, and delivered possession of the premises to him; the sale to Young was rescinded, and Hester subsequently filed a bill for a rescission of his contract with Hooker, and for a cancellation of his notes, which were still outstanding; Hooker filed a cross bill to compel a specific performance of the contract, alleging a readiness upon his part to comply with the terms of the contract: *Held*, that both the original bill and cross-bill should be dismissed, and the parties left to their legal remedies. *B.*

STATUTES.

It seems that the English statutes as far back as the 32 Hen. VIII. are not in force in this state. *Sessions v. Reynolds*, 130.

SURETY.

1. Where an application is made to the probate court to remove an executor for insufficient security on his bond, the sureties may prove their sufficiency by their own oath, like the qualifying of bail; which being done, it then devolves on the other party to show their insufficiency by other evidence.

Ross v. Mims, 191.

2. Under the statute of this state (H. & H. 413,) limiting the period in which claims must be presented against the estates of deceased persons, and providing that on a failure to present, the claim is barred, and the estate discharged from the debt, if a creditor who holds a note against a principal and sureties, fails after the death of the principal to present it to the administrator within the prescribed time to save the bar of the statute, the sureties are not thereby discharged. *Cokea v. Commissioners Sinking Fund*, 437.
3. Where E. sold a tract of land to P., representing that the title was unincumbered, though at the time it was largely incumbered, and P. gave a note to E. for the purchase-money with W. as his surety, and the assignee of E. sued P. and W. at law upon the note and obtained judgment; and W. filed a bill in chancery to enjoin the judgment at law on the ground of the fraud committed by E. on P. in the sale of the property, and did not

make P. a party to the bill, and P. did not complain of the judgment at law: *Held*, that W. was not entitled to be relieved therefrom.

Walker v. Gilbert, 456.

4. Whether a surety can ever avail himself of a defect in the contract of his principal. *Quere? Ib.*
5. The obligation of the contract of a surety arises from the consideration received by his principal; and if the principal be bound, the surety is also, unless there has been some variations in the terms of the contract; where therefore a principal had by promises to an assignee induced him to purchase his and his surety's note, and thereby precluded himself from setting up a failure of consideration of the note as to the payee: *Held*, that the surety was likewise precluded from making the defence.

Dillingham v. Jenkins, 479.

6. Mere indulgence granted to the principal in a note, without the consent of the surety, does not release the surety; to release the surety there must be a valid agreement for indulgence, founded upon a sufficient consideration, such an agreement as can be enforced in a court of justice.

Waddington v. Gary, 522.

7. Indulgence granted to the principal in a note, without the consent of the surety, upon the promise of the principal to pay the note out of the proceeds of a particular judgment, or if that failed, then out of a particular note, will not release the surety, the creditor having no means of enforcing either promise. *Ib.*
8. Where one surety on a note pays it, and files a bill against a co-surety for contribution, the defendant may prove by parol evidence the engagement actually undertaken by him when he signed the note. *Hunt v. Chambliss*, 532.
9. In a controversy between two sureties on a note for contribution, the principal being equally liable to both, stands indifferently between them, and is a competent witness. *Ib.*
10. B. made a note with H. and others, as sureties thereon, to a bank; when it became due, B. wished to renew it; but the bank would not permit the renewal to be made without the payment of a portion of the amount due and additional security given; B. to obtain the renewal, paid the sum required by the bank, and requested C. to go on the note to be given in renewal, having previously obtained the names of the parties who were bound on the first note, and C. did so; judgment was obtained on the last note, and H. paid the money and filed a bill against C. for contribution. *Held*, that C. was not a co-surety with H. and others for B., but a surety for B. and his original sureties, and therefore not liable for contribution to H. *Ib.*
11. Where a conveyance is made to sureties of the grantor, conditioned that the conveyance shall be void if the grantor pays the debt on which the grantees are sureties, otherwise to remain in full force and virtue, although the creditor knows nothing of the debt; yet as its provisions are for his benefit, his

assent to it will be presumed, and the deed will be held to be not only as an indemnity to the sureties, but as a security for the debt; the sureties will be regarded as trustees for the benefit of the creditor, and will have no right to discharge or defeat the trust, unless it be to a purchaser for a valuable consideration without notice. *Ross v. Wilson et al.* 753.

12. B. W. & Co. were indebted to R.; and W., one of the firm of B. W. & Co. gave his note with G. & D. as sureties thereon, for the payment of the debt. W. subsequently conveyed certain property to G. & D. on condition that if W. should pay the debt to R. and also a note due by W. to D., then the conveyance should be void; otherwise to remain in full force and virtue, which conveyance was duly recorded; B. W. & Co. were also largely indebted to W. W., and W. W. having obtained judgment against B. W. & Co., agreed with G. & D. to pay the debt W. owed D., if they would release all interest acquired by them under the conveyance to them by W., and they did so; and W. then conveyed the same property to W. W.; R. filed a bill to subject the property mentioned in the conveyance to G. & D. to the payment of his debt: *Held*, that the conveyance to G. & D. constituted them trustees for the benefit of R., and they did not discharge the trust by the release to W. W., he having notice of the debt to R.; but as the conveyance was also intended as a security for the debt due by W. to D., and as W. W. paid the debt to D., he ought, in equity, to be substituted to the rights of D.; that the property therefore should be sold, and the proceeds divided between R. and W. W. in proportion to the amount due R. and the debt W. W. paid to D. *Ib.*

TENANT IN COMMON.

1. It seems that one tenant in common cannot maintain an action of ejectment against his co-tenant, or those claiming under him, without proof of ouster by such co-tenant; an ouster, however, may be inferred from circumstances, and it is a matter of fact for the finding of a jury. *Harmon v. James*, 111.
2. Whether, if a tenant in common be ousted by his co-tenant, he may lawfully convey his interest in the premises, or whether the deed will be void for champerty. *Quare?* Yet if an action by those claiming under one tenant in common against those claiming under the other, the court instruct the jury, that if the deed from the tenant, under whom the plaintiff claims, was made after the ouster by his co-tenant, the deed was void for maintenance, and the jury find for the plaintiff, the verdict will not be disturbed at the instance of the defendant. *Ib.*

TENDER.

To an action on a note, payable "in the notes of the chartered banks of Mississippi *at par*," a plea of tender in the notes of "chartered banks of Mississippi," without averring that they were "*at par*," is good.

Smith v. Elder, 507

TITLE.

It seems that a mere release of title to land does not pass the right to land of which another person is in the actual, visible possession, claiming a right; yet it may be used as a conveyance of the estate to one in possession; or as a mean of transferring or enlarging an estate by giving some new interest; or as perfecting an imperfect and defeasible estate; and it seems that any interest in the person to whom the release is made, either by possession, or in deed, or in law in his own or another's right, any vested interest without an actual possession, will be a sufficient foundation for the release to stand upon. *Sessions v. Reynolds*, 130.

In a country abounding in wild land, a deed or grant is a constructive possession in the grantee sufficient to uphold a title derived by a release from one having title to the land; where, therefore, the Spanish government granted the same land first to R. and afterward to F. and R. subsequently released to F., the constructive possession of F. under his grant will be sufficient to uphold the release from R. *Ib.*

Where a release of title to land was thirty-five years old, it was *held* to be of an age sufficient to draw to its support the favorable presumption of the law, that it was operative at the time of its execution; which presumption is supported by proof of the possession of the release as far back as there is any evidence of possession. *Ib.*

The title to the whole of a tract of land, with possession of part of it, is a possession of the whole of it, and will support a release of title to the whole.

Ib.

In order to defeat a release, it seems there should be proof of an actual adverse possession under a claim of right; therefore where the release was in possession long before there was any adverse claim, or for anything that appeared to the contrary was in possession when the release was made, it was *held*, that the release would be operative. *Ib.*

The objection to a release on the ground of the want of possession or other interest in the releasee at the time of its execution, loses much of its force when made in this court for the first time; and when the objection made to its admissibility in the court below was as to its authenticity. *Ib.*

TRUST.

M. bought a piece of land from P. and paid part of the price in cash, and received a bond for title on payment of the residue; S. afterwards sold the same land to C., who resold it to M.; subsequent to the sale by P. to M., but before the sale by P. to C., a judgment was recovered by D. against P. and execution thereon levied on the same land; *held*, that M. was entitled to an injunction against the sale; that P. had not an interest capable of sale under execution, and was a mere trustee of the title for M., whose interest was not affected by the sale to C., though it might have been otherwise if

C. had set up that he was a *bona fide* purchaser for a valuable consideration without notice of the previous sale to M. *Money v. Dorsey*, 15.

2. Where a purchaser of property buys it with the money of another, the trust thereby created in favor of the party whose money is thus used is an implied, and not an express one, and is subject to the statute of limitations; continuing, express trusts forming the only class protected from the operation of the statute; where, therefore, the trustee denies the right of the *cestui que trust*, and asserts an adversary claim, it is an abandonment of the fiduciary character, and the statute of limitations will commence running from that day, if there be no disability as to the other parties.

Murdock v. Hughes, 219.

3. If trusts which arise under a will be of a character that require equitable interposition, the fact that they were created by a will cannot exclude the jurisdiction of equity. *Wade v. American Colonization Society*, 663.
4. If the probate court cannot grant full and adequate relief, in cases of trust arising under a will, the chancery court may take jurisdiction. *Ib.*
5. R., by his will, directed that after his decease his slaves should be called together, and such of them as elected to go to Africa, the provisions of the will being first fully explained to them, should be sent there under the directions and superintendence of the American Colonization Society; that such of his slaves as did not elect to go to Africa, together with all the residue of his estate, except a few slaves, particularly mentioned, should be sold, and the proceeds after the payment of certain legacies, and all necessary expenses, be paid over to the American Colonization Society, to be appropriated first to paying the expenses of transporting his slaves to Africa, and secondly to their support and maintenance when there; the executors refused to sell any portion of the estate, or deliver the slaves to the American Colonization Society, as directed by the will, because, as they contended, the trusts created by the will were in violation of the policy of this state, and in fraud of the statute on the subject of manumission, and therefore illegal and void, and the American Colonization Society filed a bill in the superior court of chancery against the executors, to compel the execution of the trusts and to carry out the provisions of the will; the executors resisted the bill on the further ground that it related to a matter purely of administration, and cognizable only in the probate court. *Held*, that the trusts created by the will were legal and valid; that the full measure of relief could only be attained in a court of equity, and therefore the court of chancery had jurisdiction. *Ib.*
6. Bequests made to slaves who are directed by the will to be transported to Africa and remain there, are not void for want of capacity in the legatees to take; the slaves have an inchoate right to freedom under the will, which is complete as soon as they are removed out of this state. *Ib.*
7. Where a will directs that the slaves of the testator shall be transported to Africa, under the direction and superintendence of the American Colonization Society, and that the executors should sell certain portions of the

- estate and pay over the proceeds to the Colonization Society, to be used by them in paying the expenses of transporting the slaves to Africa, and for their support and maintenance when there; the trusts are not void for want of capacity in the American Colonization Society to take for such purposes. *Ib.*
8. The American Colonization Society filed a bill against the executors of R., alleging that R., by his last will, directed his slaves to be sent to Africa under the superintendence and direction of complainants, and that the executors should sell certain portions of his estate and pay over the proceeds to complainants, provided they would agree to appropriate the same to paying the expenses of transporting the slaves to Africa and supporting and maintaining them when there; that the complainants were duly and legally incorporated; that they were willing to accept and appropriate the funds, as provided for in the will, the object of the Society, by their charter, being in accordance with the provisions of the will and in furtherance thereof; that by the decisions of the courts the will and provisions were fully established, and the rights of complainants to the slaves and estate, in trust as bequeathed in the will, and for the purposes therein contained, were fully confirmed, &c. The executors demurred to the bill, because there was no averment that the complainants were an incorporated society at the time of the testator's death, and because the complainants had no power or authority, under their charter, to take for the purposes and objects mentioned in the will; the chancellor disallowed the demurrer: *Held*, that the demurrer was properly disallowed. *Ib.*
9. Where a testator directs in his will that his slaves shall be transported to Africa, under the superintendence of the American Colonization Society, and that the executors shall sell certain portions of the estate and pay over the proceeds to the society, to be applied by them to the payment of expenses incurred in transporting the slaves to Africa, and supporting them when there, both the executors and the society are constituted trustees; it is the duty of the executors to deliver the slaves to the society for the purposes of the will; and it is the duty of the society to carry out those purposes; and if the executors will not discharge their duty, and interpose obstacles to the execution of the trust by the society, clearly a court of equity may enforce the performance. *Ib.*
10. If an incorporation be appointed a trustee to execute trusts arising under a will, which are in themselves valid in point of law, neither the heirs of the testator, nor any other private person, can inquire into or contest the right of the corporation; that could only be done by the state which granted the charter. *Ib.*

TRUST DEED.

1. Where a conveyance is made to sureties of the grantor, conditioned that the conveyance shall be void if the grantor pays the debt on which the grantees

are sureties, otherwise to remain in full force and virtue, although the creditor knows nothing of the deed; yet as its provisions are for his benefit, his assent to it will be presumed, and the deed will be held to be not only as an indemnity to the sureties, but as a security for the debt; the sureties will be regarded as trustees for the benefit of the creditor, and will have no right to discharge or defeat the trust, unless it be to a purchaser for a valuable consideration without notice. *Ross v. Wilson*, 753.

2. B. W. & Co. were indebted to R.; and W., one of the firm of B. W. & Co., gave his note with G. & D. as sureties thereon, for the payment of the debt. W. subsequently conveyed certain property to G. & D. on condition that if W. should pay the debt to R. and also a note due by W. to D., then the conveyance should be void; otherwise to remain in full force and virtue, which conveyance was duly recorded; B. W. & Co. were also largely indebted to W. W., and W. W. having obtained judgment against B. W. & Co., agreed with G. & D. to pay the debt W. owed D., if they would release all interest acquired by them under the conveyance to them by W., and they did so; and W. then conveyed the same property to W. W.; R. filed a bill to subject the property mentioned in the conveyance to G. & D. to the payment of his debt: *Held*, that the conveyance to G. & D. constituted them trustees for the benefit of R., and they did not discharge the trust by the release to W. W., he having notice of the debt to R.; but as the conveyance was also intended as a security for the debt due by W. to D., and as W. W. paid the debt to D., he ought, in equity, to be substituted to the rights of D.; that the property therefore should be sold, and the proceeds divided between R. and W. W., in proportion to the amount due R. and the debt W. W. paid to D. *Id.*

TRUSTEE.

1. Whenever a trustee sells the trust estate and becomes himself the purchaser, the sale may be set aside at the option of the *cestui que trust*, as a matter of course; without regard to the fairness or unfairness of the sale; in setting the sale aside, however, the court will order the property to be resold; and if it should not bring a higher price on the second sale, then the original sale is confirmed, or the court, in its discretion, may set aside the sale entirely if necessary, and order the purchase-money to be refunded. The same rule applies to a purchase by a guardian of his ward's property.

Scott v. Freeland, 409.

2. Where a trustee has become the purchaser of his *cestui que trust's* property, if the *cestui que trust* do not in a reasonable time take steps, after he comes to a knowledge of the sale, or, if he be a minor, after his disability is removed, to set the sale aside, his assent to the purchase will be implied. Where, therefore, W. S. died, leaving five children, W. became guardian for two of them, B. for two, and F. for one, and the guardians applied for and obtained an order of sale of the realty of their wards, and F. became the pur-

chaser ; at the time of the sale the oldest of the wards was twenty years old, the youngest about twelve ; ten years after the sale, the wards exhibited their bill against F. to have the sale set aside, because F., their guardian, was the purchaser of the property : *Held*, that the laches of the two oldest children, and their delay and neglect in not applying earlier to have the sale set aside, implied an affirmance of the sale by them, and precluded them from the relief they sought. *Ib.*

3. The assent of the *cestui que trust* to the purchase of the trust property by the trustee, in order to ratify the sale need not be express, it is often implied from circumstances, one of the strongest of which is a failure to take immediate steps, on the *cestui que trust's* obtaining knowledge of the sale, and being freed from disability, to have the sale set aside. *Ib.*
4. Where the property of the ward has been purchased by his guardian, and the ward, on arriving at age, receives the value of the property sold, with a full knowledge of what had been done by his guardian, it is an affirmance of the purchase of the trust property by the guardian, and vests the property in him ; though the reception by the ward of his distributive share, on his arrival at age, ought not to be construed too strongly against him, and ought not to operate to his prejudice when it is obvious that he acted without due precaution. *Ib.*

VENDOR AND VENDEE.

1. The interest of the vendor in land who has given a bond for title, on payment of the purchase-money, and who has received a portion thereof from the vendee, is not subject to seizure and sale under execution at law, at the suit of a judgment-creditor, who has obtained his judgment since the date of the title bond and the payment of such portion of the purchase-money. *Money v. Dorsey*, 15.
2. Where a bond to make title on payment of the purchase-money is given, the vendor has a lien on the land for the payment thereof ; and when the vendee has paid the whole or any part thereof, he has a lien on the land for the title, which will prevail against the lien of judgment creditor of the vendor whose judgment is subsequent to the agreement to convey and the receipt of the consideration money ; it seems, however, that the lien of such vendee will not prevail against a *bona fide* purchaser from the vendor subsequent to the date of the title bond and payment of portion of the purchase-money, for a valuable consideration and without notice. *Ib.*
3. The extent of the right of a judgment creditor of the vendor of real estate, who has given a bond for title on payment of the purchase-money, and received a portion thereof, is to subject the unpaid purchase-money in the hands of the vendee to the satisfaction of his judgment. *Ib.*
4. The lien of a judgment operates only on the interest of the judgment debtor at the date of its rendition ; and cannot therefore prevail against the prior equitable lien of a vendee from such judgment debtor who has received

from his vendor a bond for title and paid part of the purchase-money; though his bond for title has never been recorded. *Ib.*

5. M. bought a piece of land from P. and paid part of the price in cash, and received a bond for title on payment of the residue; P. afterwards sold the same land to C., who resold it to M.; subsequent to the sale by P. to M., but before the sale by P. to C., a judgment was recovered by D. against P., and execution thereon levied on the same land: *held*, that M. was entitled to an injunction against the sale; that P. had not an interest capable of sale under execution; and was a mere trustee of the title for M., whose interest was not affected by the sale to C.; though it might have been otherwise if C. had set up that he was a *bona fide* purchaser, for a valuable consideration, without notice of the previous sale to M. *Ib.*
6. A deed to a married woman is not void; as to third persons it is valid, whether she can be compelled to pay for it or not, that concerns the vendor alone; when, therefore, B. conveyed a lot of ground to J., a married woman, and J. and her husband sued H. in ejectment for the lot, *held*, that H. could not object to the validity of J.'s title on account of her coverture.
Harman v. James, 111.
7. A deed conveying all the vendor's lots in a certain town, is not uncertain, but is sufficient to convey all the vendor's interest derived by a deed from the commissioners who laid off the town. *Ib.*
8. Although, as an abstract proposition, it is true that a grantor who disposes of land by a valid operative deed, cannot subsequently dispose of the same land by a valid operative deed to a different person; yet if the original conveyance be defective, the second of course would pass the estate; whether if the same person claim under both grants, he may establish his right under either, as he may please. *Quære? Sessions v. Reynolds*, 130.
9. A declaration by a vendee who has received from his vendor a bond to make title on payment of the purchase-money, against the obligor therein for a failure to make title, is fatally defective, which neither avers that "the vendee demanded a deed of the vendor," nor that "the vendee prepared a deed and tendered it to the vendor and demanded its execution." *Johnston v. Beard*, 214.
10. Whether the vendee who has a bond for title on payment of the purchase-money, can maintain an action against his vendor for a failure to make title after having demanded a deed of the vendor, or whether he must have prepared a deed and tendered it to the vendor, and demanded its execution,—*Quære? Ib.*
11. In cases free from fraud, a purchaser of land who is in possession cannot have relief in chancery against his contract to pay, on the mere ground of a defect in title, without a previous eviction. *Vick v. Percy*, 256.
12. A vendee in possession under a deed with warranty, with no fraud made manifest, and with nothing to show that the vendor is not able to pay any damages that may be recovered against him, has no right to call his

- vendor into a court of equity to litigate an adverse legal title; he must rely on his covenants if he should be evicted. *Ib.*
13. If a vendee buy lands with a knowledge of the defective title, he cannot be relieved from his contract to pay for them, because of such defect. *Ib.*
 14. Courts will construe covenants to be dependent unless a contrary intention clearly appears; in an action, therefore, on a note given for land, to which the vendee received a bond for title to be made when the purchase-money was paid, and that was payable in instalments, the right to enforce payment is not distinct and independent from the inability to make title, and the defendant may set up and show in bar of the action on the notes a want of title in the vendor. *Pegues v. Mosby*, 340.
 15. Possession of real estate is notice of the title of the possessor; and if he be in possession under an unrecorded deed, the property will not be subject to judgments against his vendor recovered since the execution of the deed. *Walker v. Gilbert*, 456.
 16. If a purchaser of real estate has protected himself by covenants, he is not entitled to be relieved from his contract if it be unmixed with fraud, until after eviction. *Ib.*
 17. Where E. sold a tract of land to P. representing that the title was unincumbered, though at the time it was largely incumbered, and P. gave a note to E. for the purchase-money, with W. as his surety; and the assignee of E. sued P. and W. at law upon the note, and obtained judgment; and W. filed a bill in chancery to enjoin the judgment at law, on the ground of the fraud committed by E. on P. in the sale of the property, and did not make P. a party to the bill, and P. did not complain of the judgment at law; *held*, that W. was not entitled to be relieved therefrom. *Ib.*
 18. W. leased to J. a tract of land for ninety-nine years, and placed J. in possession, J. being fully acquainted with the nature of W.'s title at the time; J. afterwards refused to comply with his contract, and abandoned the possession of the premises; whereupon W. sued him, and recovered judgment at law for the consideration of the lease. J. then filed a bill to set aside the lease, recover back the money he paid on it, and to enjoin perpetually the judgment, on the ground of the statute of frauds and the defect of W.'s title; it was shown that W. was wholly divested of title between the date of the lease and the filing of the bill, but that his title was perfect at the time the bill was filed; no fraud was proved against W.; and the vice-chancellor dismissed the bill: *Held*, that J. showed no equitable grounds of relief, and his bill was therefore properly dismissed.
Jenkins v. Whitehead, 577.
 19. The interest of a party in land, who holds only a bond for title when the purchase-money is paid, and who has paid only a part of the purchase-money, is not subject to sale under an execution at law. *Delafield v. Anderson*, 630.
 20. The interest of a party holding only a bond for title to land, the whole of the purchase-money not being paid, is not subject to a sale under an execution at law. *Ellis v. Ward*, 651.

21. McG. purchased of the board of police of the county of Ponola, a lot in the town of Ponola, and took a bond for title when the last instalment on the lot was paid; McG. sold the lot to W. and assigned him the title-bond, without any covenants on his part, W. contracting to pay the last instalment due by McG. to the board of police; E. under a judgment recovered by him against McG. after the assignment of the title-bond to W. had the lot sold by the sheriff, and bought it himself, having full notice of the assignment of the bond to W.; E. then procured the board of police, by their president, to execute direct to him a deed to the lot, and he paid them the last instalment due by McG., and which W. had assumed the payment of, the board of police having notice also of the assignment of the bond to W.; E. obtained possession of the lot, and put improvements upon it; W. filed a bill to have the deed to E. from the president of the board of police set aside and cancelled, and for a specific performance of his contract with the board of police: *Held*, that W. was entitled to the relief sought, but that E. had a lien on the lot for the instalment paid by him to the board of police, and that he should be allowed for his improvements, to be applied to the extinction of the rent, so far as they will go. *Ib.*

WITNESS.

26. Where a suit was brought in the name of one for the use of another, the nominal plaintiff, where the testimony is against himself, is a competent witness, though objected to by the usee, if he do not himself object to testify. *Smith v. Elder*, 507.
2. Where a note was payable "in the notes of the chartered banks of Mississippi at par;" it is not competent to explain by parol the kind of funds in which the note was payable; as there was no latent ambiguity in the note; the note meaning that the notes of chartered banks were to be taken as at par, that is, without discount or premium. *Ib.*
3. In a controversy between two sureties on a note for contribution, the principal, being equally liable to both, stands indifferently between them, and is a competent witness. *Hunt v. Chambliss*, 532.
4. Where a party holding a bond for title to land assigns it to another, without any covenant on his part, and the same land is sold under an execution against the assignor of the bond, in a controversy between the assignee of the bond and the purchaser at the sale under the execution, the assignor of the bond is an incompetent witness to prove that he assigned the bond, without any consideration and in fraud of his creditors. *Ellis v. Ward*, 651.
5. As a general rule, an agent is a competent witness for, as well as against his principal; but where a judgment in favor of the party calling him will procure a direct benefit to himself he is incompetent.
Poindexter v. La Roche, 699.
6. L. filed a bill against P. to foreclose a mortgage; P. answered that he had paid the debt secured by the mortgage to W. the agent of L. to whom as agent the mortgage was executed and the notes thereby secured given; L.

called W. as a witness to prove that the money or a large portion of it paid by P. to W. had been applied by W. without consulting P. to the payment of a debt which P. owed W. in his own right, and not the payment of the debt secured by the mortgage, and P. objected to W. as an interested and therefore incompetent witness: *Held*, that W. if permitted to testify would possess the means of securing the payment of his own demand, and also to discharge himself from liability to his principal by charging P.; and his evidence therefore in relation to his individual transactions with P. was inadmissible. *Ib.*

WRIT OF ERROR.

1. The official duties of a clerk of the circuit court embrace every act that the law requires him to perform in virtue of his office; the issuance therefore of a writ of error is an official act, and so also is his taking bond with two or more sufficient sureties upon the issuance of such writ. *McNutt v. Livingston*, 641.
2. The clerk of the circuit court is liable upon his official bond for issuing a writ of error and a supersedeas without taking from the defendant in the judgment, bond conditioned according to law, with two or more sufficient sureties; in such case the bond may be sued on by any person injured, and a recovery be had to the amount of the penalty thereof. *Ib.*
3. Whether the law makes the clerk of a circuit court guarantee the sufficiency of the sureties on a bond taken by him upon the issuance of a writ of error and a supersedeas,—*Quære?* *Ib.*
4. The granting of a writ of error by the clerk of a circuit court in pursuance of the statute H. & H. 541, is a ministerial, and not a judicial act. *Ib.*
5. In an action against the clerk of the circuit court and his sureties on his official bond, for the failure of the clerk to take a bond with two or more sufficient sureties upon the issuance by him of a writ of error and a supersedeas, it is no answer to the sufficiency of the declaration to say that the erroneous conclusion of the clerk in regard to the sufficiency of the sureties is no breach of his bond; nor in deciding upon the sufficiency of the declaration is the fact that the sheriff had made a sufficient levy, which was not discharged by the supersedeas, a proper subject of inquiry. *Ib.*

WILL.

1. If trusts which arise under a will be of a character that require equitable interposition, the fact that they were created by a will cannot exclude the jurisdiction of equity. *Wade v. American Colonization Society*, 663.
2. If the probate court cannot grant full and adequate relief, in cases of trust arising under a will, the chancery court may take jurisdiction. *Ib.*
3. R., by his will, directed that after his decease his slaves should be called together, and such of them as elected to go to Africa, the provisions of the will being first fully explained to them, should be sent there under the directions and superintendence of the American Colonization Society; that such of

his slaves as did not elect to go to Africa, together with all the residue of his estate, except a few slaves, particularly mentioned, should be sold, and the proceeds after the payment of certain legacies, and all necessary expenses, be paid over to the American Colonization Society, to be appropriated first to paying the expenses of transporting his slaves to Africa, and secondly to their support and maintenance when there; the executors refused to sell any portion of the estate, or deliver the slaves to the American Colonization Society, as directed by the will, because, as they contended, the trusts created by the will were in violation of the policy of this state, and in fraud of the statute on the subject of manumission, and therefore illegal and void, and the American Colonization Society filed a bill in the superior court of chancery against the executors, to compel the execution of the trusts and to carry out the provisions of the will; the executors resisted the bill on the further ground that it related to a matter purely of administration, and cognizable only in the probate court. *Held*, that the trusts created by the will were legal and valid; that the full measure of relief could only be attained in a court of equity, and therefore the court of chancery had jurisdiction. *Id.*

4. Bequests made to slaves who are directed by the will to be transported to Africa and remain there, are not void for want of capacity in the legatees to take; the slaves have an inchoate right to freedom under the will, which is complete as soon as they are removed out of this state. *Id.*
5. Where a will directs that the slaves of the testator shall be transported to Africa, under the direction and superintendence of the American Colonization Society, and that the executors should sell certain portions of the estate and pay over the proceeds to the Colonization Society, to be used by them in paying the expenses of transporting the slaves to Africa, and for their support and maintenance when there; the trusts are not void for want of capacity in the American Colonization Society to take for such purpose. *Id.*
6. The American Colonization Society filed a bill against the executors of R., alleging that R., by his last will directed his slaves to be sent to Africa under the superintendence and direction of complainants, and that the executors should sell certain portions of his estate and pay over the proceeds to complainants, provided they would agree to appropriate the same to paying the expenses of transporting the slaves to Africa and supporting and maintaining them when there; that the complainants were duly and legally incorporated; that they were willing to accept and appropriate the funds, as provided for in the will, the object of the Society, by their charter, being in accordance with the provisions of the will and in furtherance thereof; that by the decisions of the courts the will and provisions were fully established, and the rights of complainants to the slaves and estate, in trust as bequeathed in the will, and for the purposes therein contained, were fully confirmed, &c. The executors demurred to the bill, because there was no averment that the complainants were an incorporated society

at the time of the testator's death, and because the complainants had no power or authority, under their charter, to take for the purposes and objects mentioned in the will; the chancellor disallowed the demurrer: *Held*, that the demurrer was properly disallowed. *Ib.*

7. It is only where the bequest or devise is too vague or indefinite for those intended to be benefited to claim any interest under them, that the doctrine as to charities arises: definite charities are trusts, which equity will execute by virtue of its ordinary jurisdiction. *Ib.*
8. Whether the statute 43 Elizabeth is in force in this state; and whether the court of chancery has any jurisdiction over charities, to compel their performance, apart from and independent of that statute, — *Quære?* *Ib.*
9. Where a testator directs in his will that his slaves shall be transported to Africa, under the superintendence of the American Colonization Society, and that the executors shall sell certain portions of the estate and pay over the proceeds to the society, to be applied by them to the payment of expenses incurred in transporting the slaves to Africa, and supporting them when there, both the executors and the society are constituted trustees; it is the duty of the executors to deliver the slaves to the society for the purposes of the will; and it is the duty of the society to carry out those purposes; and if the executors will not discharge their duty, and interpose obstacles to the execution of the trust by the society, clearly a court of equity may enforce the performance. *Ib.*
10. Whether, if a testator in his will directs that his slaves shall be sent to Africa, and the will constitutes no trustee to take them, any remedy exists to the slaves, — *Quære?* *Ib.*
11. The American Colonization Society is not prohibited by its charter from transporting slaves directed by a will to be sent to Africa under the superintendence of the society. *Ib.*
12. If an incorporation be appointed a trustee to execute trusts arising under a will, which are in themselves valid in point of law, neither the heirs of the testator nor any other private person, can inquire into or contest the right of the corporation; that could only be done by the state which granted the charter. *Ib.*
13. By the will of R. his slaves were directed to be transported to Africa, under the direction and superintendence of the American Colonization Society; the provisions of the will were declared valid by the judgment of the high court of errors and appeals, and the slaves declared entitled to an inchoate right of freedom, which would be perfect by their removal from the state; the legislature subsequently, in 1842, passed an act giving twelve months for the removal of slaves heretofore liberated, and declaring the bequest of freedom void if they be not so removed; one of the executors of R. detained the slaves in this state against their will, and against the will of the society and of his co-executors, until the twelve months, allowed by the act of 1842, expired; before the twelve months however had expired, the society, after using every means in its power to comply with the requisitions

of the act, without suit, filed a bill to compel the executors to execute the trusts created by the will: *Held*, that the acts of the executor constituted such a fraud, that neither he nor any one claiming by virtue of his acts acquired any right; that the fraud of the executor placed him beyond the pale of the act of 1842, and that act did not therefore apply to the case. *Ib.*

14. Whether the act of 1842, giving twelve months from and after its passage for the removal of slaves *theretofore* liberated, or directed by any last will and testament to be sent beyond the limits of this state, and declaring all such bequests of freedom void, if the slaves be not so removed, is valid and constitutional, as to cases arising under will, duly proved and admitted to record before its passage, — *Quære?* *Ib.*

Ex. J. M.

5310-97

